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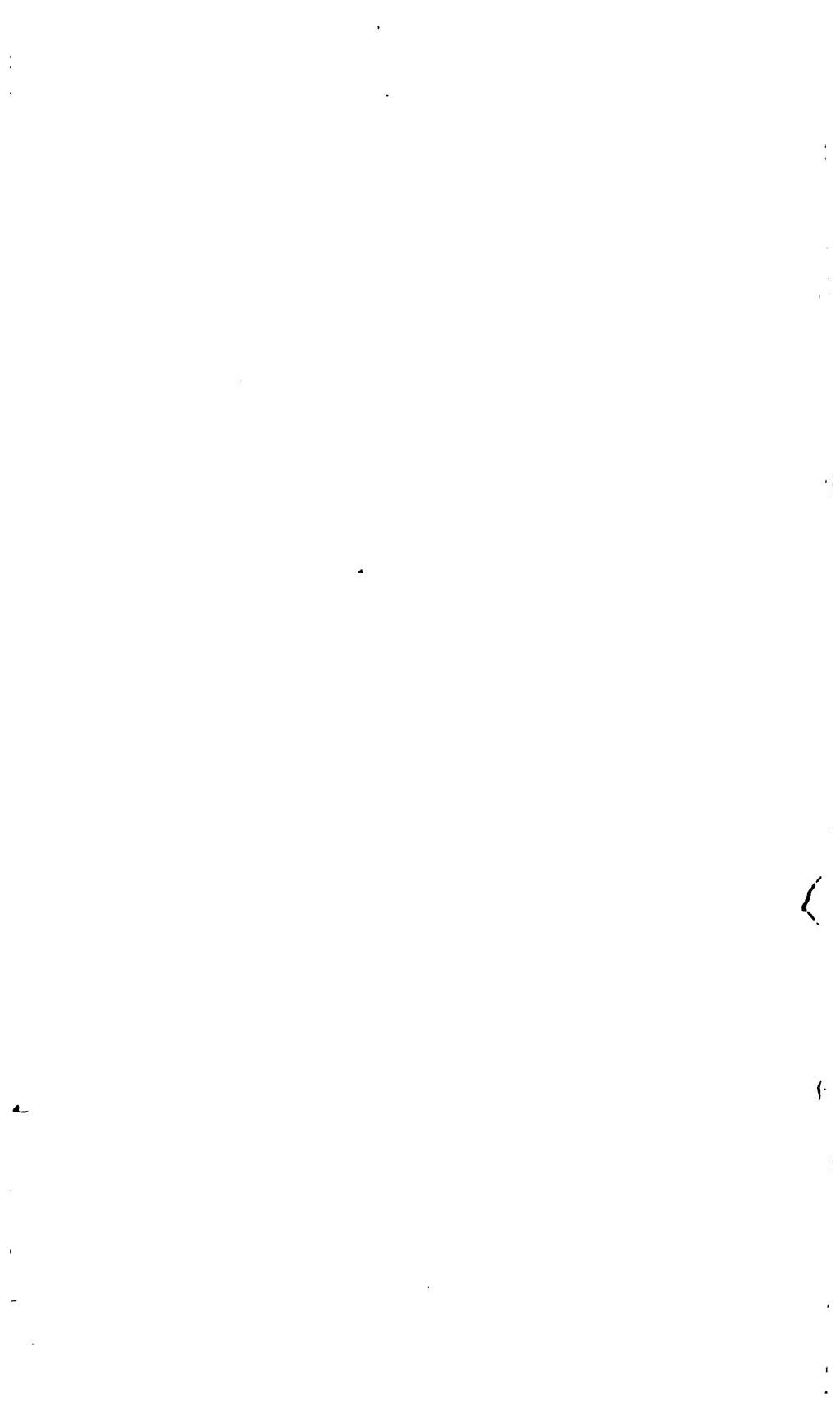


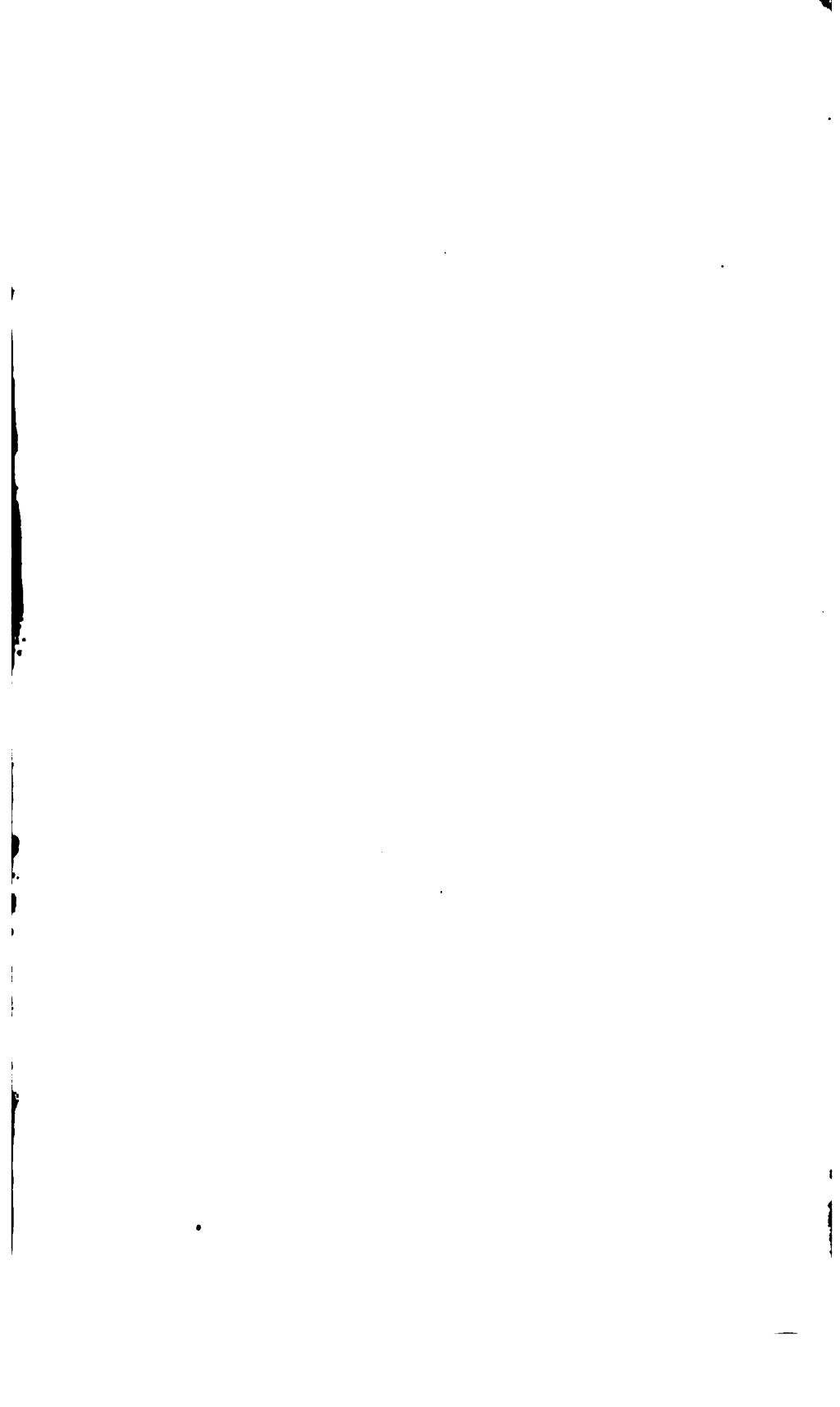


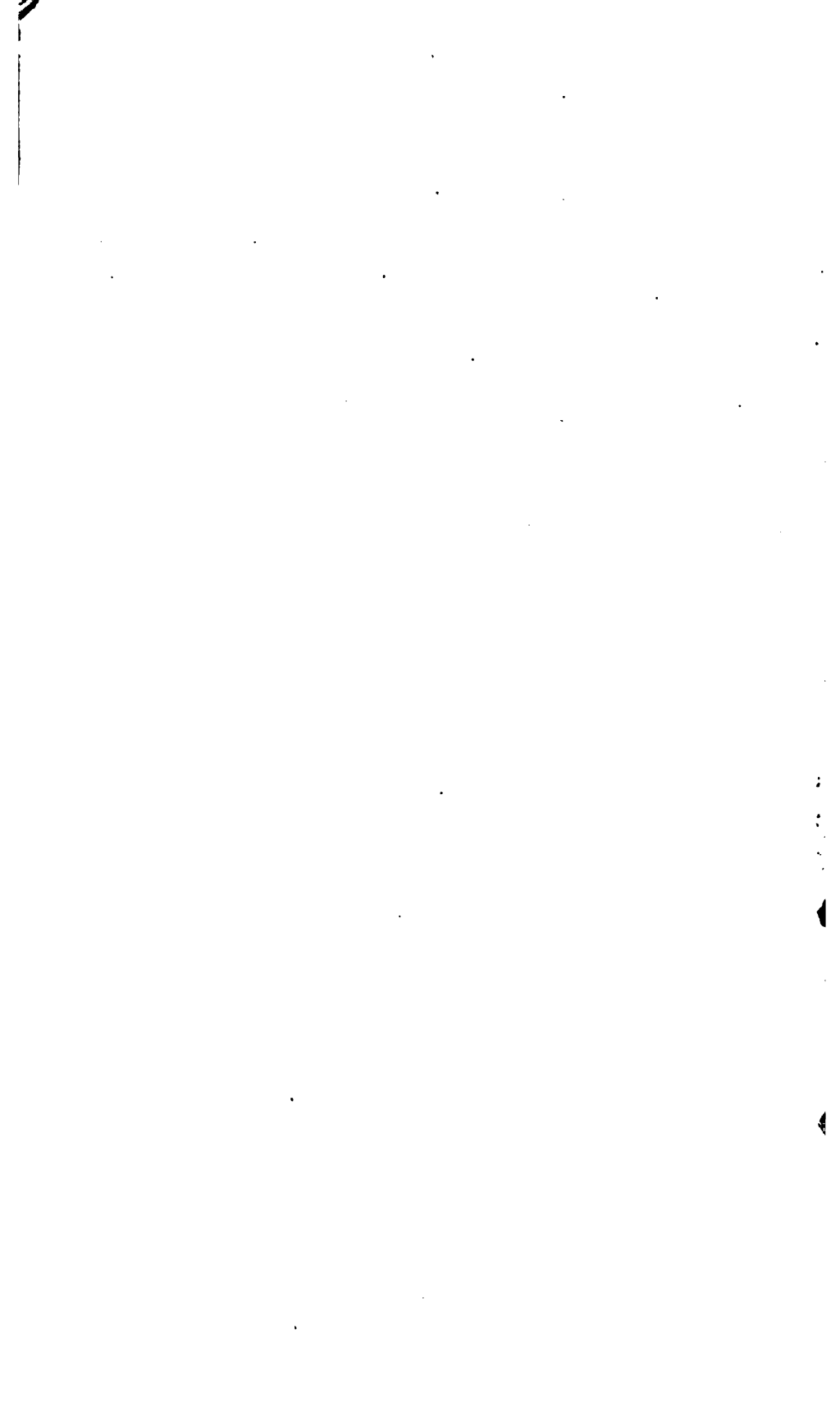
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OF

*May 1*

*109 a*

Cases in Law and Equity

DETERMINED IN THE

S U P R E M E C O U R T

OF THE

STATE OF NEW YORK.

BY OLIVER L. BARBOUR, LL. D.



VOL. LI



ALBANY:

W. C. LITTLE, LAW BOOKSELLER.

1868.

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Entered according to Act of Congress, in the year one thousand eight hundred and sixty-eight,  
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*Rec March 6. 1868*

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# JUSTICES OF THE SUPREME COURT,

DURING THE YEAR 1868.

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## FIRST JUDICIAL DISTRICT.

- CLASS 1. GEORGE G. BARNARD.\*  
" 2. THOMAS W. CLERKE.†  
" 3. JOSIAH SUTHERLAND.  
" 4. DANIEL P. INGRAHAM.  
" 5. ALBERT CARDOZO.‡

## SECOND JUDICIAL DISTRICT.

- " 1. JOHN A. LOTT.†  
" 2. JOSEPH F. BARNARD.  
" 3. JASPER W. GILBERT.  
" 4. ABRAHAM B. TAPPEN.‡

## THIRD JUDICIAL DISTRICT.

- " 1. THEODORE MILLER.\*  
" 2. CHARLES R. INGALLS.†  
" 3. HENRY HOGEBOOM.  
" 4. RUFUS W. PECKHAM.§

## FOURTH JUDICIAL DISTRICT.

- " 1. AMAZIAH B. JAMES.†  
" 2. ENOCH H. ROSEKRANS.  
" 3. PLATT POTTER.  
" 4. AUGUSTUS BOCKES.§

## JUSTICES OF THE SUPREME COURT.

## FIFTH JUDICIAL DISTRICT.

- CLASS 1. WILLIAM J. BACON.\*  
 " 2. HENRY A. FOSTER.†  
 " 3. JOSEPH MULLIN.  
 " 4. LE ROY MORGAN.§

## SIXTH JUDICIAL DISTRICT.

- " 1. CHARLES MASON.¶  
 " " WILLIAM MURRAY, JR.¶  
 " 2. RANSOM BALCOM.†  
 " 3. DOUGLASS BOARDMAN.  
 " 4. JOHN M. PARKER.§

## SEVENTH JUDICIAL DISTRICT.

- " 1. HENRY WELLES.¶  
 " " CHARLES C. DWIGHT.\*\*  
 " 2. ERASMUS DARWIN SMITH.†  
 " 3. THOMAS A. JOHNSON.  
 " 4. JAMES C. SMITH.

## EIGHTH JUDICIAL DISTRICT.

- " 1. CHARLES DANIELS.†  
 " 2. RICHARD P. MARVIN.  
 " 3. NOAH DAVIS.  
 " 4. GEORGE BARKER.†

MARSHALL B. CHAMPLAIN, *Attorney General.*

\* Sitting in the Court of Appeals.

† Presiding Justice.

‡ Elected in November, 1867.

§ Re-elected in November, 1867.

¶ Resigned January —, 1868.

¶ Appointed by the Governor, January 29, 1868, to fill the vacancy caused by the resignation of Judge Mason.

¶ Died January, 1868.

\*\* Appointed by the Governor, to fill the vacancy caused by the death of Judge Welles.





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CASES  
IN  
**Law and Equity**  
IN THE  
SUPREME COURT  
OF THE  
STATE OF NEW YORK.

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PETER S. WOODEN *vs.* JEREMIAH AUSTIN, President of the  
Albany and Canal Line of Tow Boats.

The owners of a steamboat employed in the business of towing boats, for hire, are not common carriers, and hence not insurers. But they are liable if guilty of gross carelessness, if not for a failure to exercise ordinary care in the management of the steamer and the boats towed.

A provision in a contract for towing that the boats shall be towed "at the risk of the master and owner" of such boat, refers to the perils of navigation, simply, and cannot properly be construed to excuse the negligence of the proprietors of the towing vessel, or those in charge thereof.

Parties undertaking to tow a boat from one place to another are bound to do so, unless prevented by causes to which at least gross negligence on their part does not contribute.

The defendant agreed to tow the plaintiff's boat from Albany to New York. After proceeding about four miles, the defendants' hawser broke, and set the plaintiff's boat, with others, adrift, which floated down the river some fourteen miles, without any attempt to regain it. There was no explanation offered in respect to the strength of the hawser; or the immediate cause of

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Wooden v. Austin.

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its breaking; or in regard to the management of the steamer; or why an effort was not made to again take the plaintiff's boat in tow, although there was evidence to the effect that there was no difficulty in the steamer taking the entire tow through to New York. In an action against the defendants for damages occasioned by their negligence; *Held* that the plaintiff was improperly nonsuited.

The question of negligence is peculiarly a question of fact to be determined by the jury; and the case must be very clear which will justify the court in withholding it from their consideration.

THIS is a motion for a new trial, made by the plaintiff upon exceptions ordered to be heard in the first instance at a general term. On the 10th day of December, 1859, the plaintiff entered into an agreement with the defendant, by which, for the consideration of \$50, the latter agreed to tow the plaintiff's boat to New York, from Albany. The plaintiff put in evidence the following:

"Albany, Dec. 10, 1859.

A. Nixon, master and owner,

To Steamboat Syracuse, Dr.

For towing from Albany to New York, at the risk of the master and owner of the boat or vessel towed, \$50.

Received payment for owners,

OGDEN WYCKOFF."

The tow started for New York at 3 P. M. of the same day, and after proceeding about four miles, the hawser broke, and the tow separated from the propeller, and the defendant, after a delay of from half to three fourths of an hour, without an effort to again take the plaintiff's boat in tow, proceeded with two barges to New York. The plaintiff's boat floated down the river fourteen or fifteen miles, and froze in, opposite Stuyvesant, where her freight was taken off. The plaintiff was nonsuited, and now moves for a new trial.

*E. F. Bullard*, for the plaintiff.

*J. H. Reynolds*, for the defendant.

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Wooden v. Austin.

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*By the Court*, INGALLS, J. The defendants were not common carriers, and hence not insurers. (*Wells v. Steam Navigation Co.*, 2 Comst. 204. *Caton v. Rumney*, 13 Wend. 387.) The defendants were certainly liable, if guilty of gross carelessness, if not for a failure to exercise ordinary care in the management of the steamer and the tow. The decisions of the courts, in this state, have not been uniform in regard to the degree of negligence to be established, to render liable the owner of a vessel used for towing only. The following cases bear upon the question: *Alexander v. Greene*, (7 Hill, 533;) *Wells v. Steam Nav. Co.* (8 N. Y. Rep. 375;) *Dorr v. New Jersey Steam Nav. Co.* (11 id. 485;) *Mercantile Mutual Ins. Co. v. Calebs*, (20 id. 173;) *Bissell v. N. Y. Central R. R. Co.*, (25 id. 442;) *Moore v. Evans*, 14 Barb. 524;) *Waite's Law and Prac.* (vol. 1, p. 357.)

The provision of the contract "at the risk of the master and owner of the vessel towed" had reference to the perils of navigation, simply, and can not properly be construed to excuse the negligence of the defendants or those in charge of their propeller; for, to give it any other effect would encourage careless and even reckless misconduct. In *Wells v. Steam Navigation Company*, (8 N. Y. Rep. 379,) MASON, J. considering a similar contract, remarks: "The parties undoubtedly had reference to those perils of navigation which were not the result of the contractor's own negligence, when they provided that the boat should be towed at the risk of the master and owners."

The question of negligence is peculiarly a question of fact to be determined by the jury, and the case must be very clear which will justify the court in withholding it from their consideration. (*Ernst v. Hudson River Railroad Co.*, 35 N. Y. Rep. 9.) We think it can hardly be said that the evidence, in the case under consideration, renders it so clear that the defendants were not guilty of a degree of negligence required to establish a liability, as to justify the court in nonsuiting the plaintiff. In determining this

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Wooden v. Austin.

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question, the evidence must be considered most favorably to the plaintiff, as by the course pursued he has been deprived of a right which he claimed upon the trial. From a careful examination of the evidence we conclude that the nonsuit should have been withheld. The defendants, by their contract, agreed to transport the plaintiff's boat to New York, and were bound to do so, unless prevented by causes to which at least gross negligence on their part did not contribute. (*Harmony v. Bingham*, 12 N. Y. Rep. 107. *Wells v. Steam Nav. Co.*, (8 *id.* 375.) The defendants, as a consideration for entering into the agreement, received the money of the plaintiff, with a knowledge of the season of the year, the condition of navigation, the capacity of their steamer, and the extent of the tow. The plaintiff's boat was taken in tow late in the afternoon of the day the propeller started for New York, and after proceeding three or four miles, the hawser of the defendants broke, and set adrift ten canal boats, including the plaintiff's. And the evidence discloses no effort on the part of the defendants to regain the tow; nor was there any explanation offered by the defendants, in respect to the strength of the hawser, or the immediate cause of its breaking; or in regard to the management of the steamer; or why an effort was not made to again take the plaintiff's boat in tow. *The rope which attached the plaintiff's boat to the hawser was not severed*; nor is there the slightest evidence showing mismanagement on the part of the plaintiff or those on board of his boat. There is evidence showing that the defendants' steamer was a staunch boat, of considerable power, and well calculated to contend with the obstacles to navigation. The plaintiff's boat drifted, by force of the current alone, down the river some fourteen miles, and the defendants' steamer, with two barges, reached New York. There is also evidence to the effect that there was no difficulty in the propeller taking the entire tow through to New York. Under the circum-



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 Lyon v. Chase.
 

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stances of this case, the conduct of those in charge of the defendants' steamer is inexplicable, and indicates a total disregard of the contract, and the rights of the plaintiff. It is apparent from the case that the learned judge reluctantly consented to take the case from the jury, and we are satisfied that upon reflection he would have declined to do so, as the case was one proper for their consideration.

We conclude that a new trial should be granted.

[ALBANY GENERAL TERM, September 16, 1867. *Miller, Ingalls and Hogeboom*, Justices.]

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 LYON vs. CHASE.
 

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An instrument, made since 1787, by one person to another, conveying lands in fee, in this state, operates as an assignment and not as a lease; and hence the strict relation of landlord and tenant is not created thereby.

There is, therefore, no distinction between the covenants contained in such an instrument and other sealed instruments, so far as the presumption of payment or extinguishment is concerned.

Where, in an action upon the covenant to pay rent, contained in such an instrument, executed in 1799, there was no evidence to show that any rent had ever been paid upon it, during a period of sixty-four years, and it appeared affirmatively not only that the defendant had not paid rent within twenty-two years, prior to the commencement of the action, but that the plaintiff had not *claimed the same*; *Held* that upon these facts the law raised the presumption that the cause of action had been released, discharged or extinguished, and the plaintiff could not recover.

The presumption of payment, in such a case, will not be repelled by an admission of the defendant that there had been a general resistance and refusal to pay rent, for the last twenty-five years, by the tenants of the manor of which the lands in question constituted a part.

THIS is an appeal by the defendant from a judgment entered upon the report of a referee in favor of the plaintiff.

*A. Bingham*, for the appellant.

*W. A. Beach*, for the respondent.

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Lyon v. Chase.

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*By the Court*, INGALLS, J. The case contains the following: "It was proved that during all the time in which the defendant had been an owner of, or connected with, the premises, *from 1842 down*, no rent on the said indenture *had been claimed, or paid by the defendant or his co-tenants*; that this suit was commenced on the 12th day of May, 1864." A more unequivocal state of facts than the above could not well be proved, as thereby it appears affirmatively, not only that the defendant had not paid rent within twenty-two years prior to the commencement of this action, but that the plaintiff had *not claimed the same*. There is certainly significance in the expression "*no rent on the said indenture had been claimed*," which implies rather an admission that the claim or cause of action did not exist, than that the remedy to enforce a supposed right of action had not been resorted to during such period. Indeed there is no evidence that rent had ever been paid upon the said indenture executed by Greenman Carpenter to Stephen Van Rensselaer on the 15th day of September, 1799, a period of about sixty-four years prior to the commencement of such action. It is settled that the instrument in question operated as an assignment and not as a lease, and hence the strict relation of landlord and tenant was not created thereby. (*Van Rensselaer v. Dennison*, 35 N. Y. Rep. 393.) There would therefore seem to be no distinction between the covenants contained in the instrument in question and other sealed instruments, so far as the presumption of payment or extinguishment is concerned. The question then arises, has the plaintiff, under the circumstances of this case, by lapse of time, lost the right to recover upon the covenants contained in the instrument in question. In other words, does the law, upon the fact thus substantially conceded, raise the presumption that the alleged cause of action has been released, discharged or extinguished? We are of opinion that it does, and that

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Lyon v. Chase.

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the plaintiff was not entitled to recover, upon the facts proved.

The case of *Tyler v. Heidorn*, (46 Barb. 439,) decided by this court, does not, in my judgment, dispose of this case. *In that case there was no positive evidence that rent had not been paid* within twenty years, and the court gave prominence to that fact. Judge HOGEBROOM remarks, at page 463: "Taking these circumstances into consideration, to wit, the supposed absence of any *necessity for proof* on the part of the plaintiff as to the payment or non-payment of rent, *except for the year 1842*; the conceded existence of an instrument providing for the payment of a perpetual rent, obligatory upon the parties to the suit; the possession and production of this instrument by the plaintiff; *the absence of any positive proof* of non-payment, or of any facts or circumstances leading to the presumption of the extinguishment of the rent; the careful transmission to the plaintiff of all the rights and interest which Van Rensselaer had to the property and the rents subsequent to the execution of the instrument, I do not think we ought to indulge the presumption that the rent was extinguished or discharged or paid." The positive evidence that no rent had been paid within twenty-two years prior to the commencement of the action, and the absence of any evidence that any rent whatever had ever been paid upon said instrument, clearly distinguishes the case at bar from *Tyler v. Heidorn*. We do not think the admission by the defendant that there had been a general resistance and refusal to pay rent for the last twenty-five years, by the tenants of the manor of Rensselaerwyck, repels the presumption which the law raises against the claim in question. It is a fact as notorious that actions were repeatedly commenced to enforce the payment of rent upon similar instruments, in one form and another, at almost all periods during the last twenty-five years, as that there has been a resistance to the payment of such rent.

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Lyon v Chase.

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The presumption of payment or extinguishment of demands or causes of action, arising from lapse of time, has been frequently enforced. In *Clark v. Hopkins*, (7 John. 556,) the court refused to allow judgment to be entered upon bond and warrant of attorney of eighteen years standing, and remark: "It has been decided that after eighteen or twenty years a bond will be presumed to have been paid." In *Jackson v. Pratt*, (10 John. 381,) the court held that when no demand had been made, or steps taken to enforce payment of a mortgage for nineteen years prior to the trial, a jury would be warranted in finding it *satisfied*. In *Giles v. Baremore*, (5 John. Ch. 545,) the court of chancery held that a mortgage upon which no interest had been paid or demanded for thirty-five years would be presumed *satisfied*.

In *Fox v. Phelps*, (20 Wend. 437,) the court decided that the performance of a condition would be presumed, after the lapse of twenty-nine years. In *Bander v. Snyder*, (5 Barb. 63,) Justice HARRIS remarks: "When the forbearance has continued twenty years, this alone is sufficient, of itself, to warrant the presumption of payment, and when connected with circumstances tending to prove payment," a shorter period will be sufficient. (See also *Failing v. Schenck*, 3 Hill, 345; *Cowen & Hill's Notes to Phil. Ev.* vol. 1, p. 316, &c. note 307.) It was held in *Livingston v. Livingston*, (4 John. Ch. 294,) that where there had been no demand of rent upon a perpetual lease, for forty-four years from the date of the lease, the lapse of time was sufficient evidence that *the rent had been extinguished*.

In *Jackson v. Davis*, (5 Cowen, 130,) SUTHERLAND, J. remarks: "*Satisfaction of the rent* might possibly be presumed, as payment of a bond will be, after a forbearance of *twenty years*, unexplained on the part of the obligee." (See also *Belmont v. O'Brien*, 12 N. Y. Rep. 395.) The law does not regard with favor the enforcement of causes of action, which by lapse of time become stale, when there are

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no circumstances proved which afford a reasonable excuse for the delay in enforcing the same. In *Ellison v. Moffatt*, (1 *John. Ch.* 46,) a bill was filed for an accounting, and it appearing that there had been a delay of twenty-six years, the chancellor dismissed the bill, and remarks: "It is against the principles of public policy to require an account after the plaintiff has been guilty of so great laches." (See also *Arden v. Arden*, 1 *John. Ch.* 313; *Pickering v. Stamford*, 2 *Ves. Jr.* 272.) In *Kingsland v. Roberts*, (2 *Paige*, 193,) the bill was filed for an accounting in regard to a transaction which occurred twenty years prior to filing the bill, and the chancellor refused relief on account of the staleness of the demand, and says: "But at all events the staleness of the demand, and the length of time which has elapsed is sufficient to induce the court to refuse its aid at this time." In *Piatt v. Vatten*, (9 *Peters*, 405,) Justice Story says, in regard to the satisfaction of a cause of action: "And we are of opinion that the lapse of time is upon principles of a court of equity a clear bar to the present suit, *independently of the statute*." He then cites with approbation the remarks of Lord Camden in *Smith v. Clay*, (note to 3 *Brown's Ch. Rep.* 640,) which are as follows: "A court of equity, which is never active in relief against conscience or public convenience, has always refused its aid to *stale demands* when the party has slept upon his rights, and acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith and reasonable diligence; when these are wanting, the court is passive and does nothing. Laches and neglect are always discountenanced, and therefore from the beginning of this jurisdiction there was always a limitation to suits in this court." Justice Story further remarks that this doctrine has repeatedly received the sanction of the American and English courts, and cites several cases in support of the assertion. (See also *Chalmer v. Bradley*,

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1 *Jac. & Walker*, 51,) where this subject is very fully discussed. We are unable to see why this principle, which seems of such universal application, does not apply to the case at bar. For, as has been before remarked, the instrument in question was executed in 1799, and there is not the slightest evidence in the case, showing that rent has been paid thereon, and there is positive evidence that none has been paid within twenty-two years prior to the commencement of this action. If such a demand is not to be regarded as stale, and for that reason barred, it is difficult to imagine one where the principle should apply. The rule is salutary, and well calculated to protect the rights of parties against the assertion of claims which from lapse of time are not easily traversed, on account of loss of evidence or other causes; and the misfortune, if any arises, certainly should be sustained by the party who has neglected to assert the claim within a reasonable time.

The answer and motion for a nonsuit sufficiently raise the question which we have considered. The judgment must be reversed, and a new trial ordered, with costs to abide the event.

[ALBANY GENERAL TERM, December 2, 1867. *Peckham, Müller, and Ingalls*, Justices.]

THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF  
NEW YORK *vs.* DEWITT C. LENT and others.

The rule, of general application, that the possession of personal property implies ownership, against the world, is exceptional in certain cases.

On the 2d of December, 1784, the common council of New York, from gratitude for the distinguished services of Gen. Washington, voted an address to him, together with the freedom of the city, in a gold box. At a subsequent meeting of the common council, on the 2d of May, 1785, the mayor produced and read a letter from Gen. Washington, in reply to the address, which was addressed to the "Honble. The Mayor, Recorder, Aldermen and Commonalty of the city of New York." By order of the common council, the address and reply were published, and entered upon the minutes. One A. was in possession of the letter in the year 1834, and continued to possess it until his death, in November, 1863, when it passed into the hands of his executrix, who, in May, 1864, placed it in the hands of auctioneers, by whom it was sold, at auction, to the defendant L. How A. became the possessor of the letter was not shown; nor did it appear that any offer was made by L. to show title, other than simple possession.

*Held* 1. That the letter was a particular and a peculiar species of property; and that its style, address and character as a response to a legislative act, should of itself be regarded as having imparted notice, to all, that from the moment of its reception and recording it became the property of the corporation to whom it was addressed.

2. That, unlike other personal property, which ordinarily possesses but little, if any, distinctive mark which might place individuals upon inquiry, this letter, so written, in such terms, and so addressed, held A. to constantly recurring notice of its ownership by the corporation.
3. That the evidence as to title to the letter was of that character which called for a finding by the jury thereon, and their finding in favor of the plaintiff was conclusive between the parties.

**A**PPEAL by the defendants from a judgment entered in favor of the plaintiff, upon the verdict of a jury, and from an order denying a motion for a new trial.

The action was brought to recover the possession of an autograph letter, written by General Washington, and addressed to the plaintiffs, in 1785, and which, in May, 1864, was sold at auction by the defendants, composing the firm of Bangs, Merwin & Co. to the defendant Lent.

It appeared in evidence that John Allan, in the year 1864, was in the possession of the letter, and that it con-

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tinned in his possession until November 1, 1863, when he died, and the possession thereof passed to Margaret Stewart, his executrix, by whom it was placed in the hands of the above named auctioneers, to be sold at public auction, and it was sold by them to Lent, for the sum of \$2050. On the 26th of October, thereafter, the plaintiffs demanded possession of the said letter, from the defendants, which was refused.

The jury found a verdict in favor of the plaintiffs, and assessed the damages for detention at six cents, and the value of the property at \$2050.

*F. N. Bangs*, for the appellants. I. The plaintiffs in this action, being the corporation called the Mayor, Aldermen and Commonalty of the city of New York, proved no past or present right of property in the letter. 1. The letter, if the property of any one besides the writer, belonged to those to whom it was addressed. It was addressed to the Mayor, Recorder, Aldermen and Commonalty of the city of New York. There was no such corporation in 1785, and the persons thus addressed were never subsequently incorporated by that name. 2. The evidence shows that the common council made no claim to be proprietors of the letter. The mayor "produced" it—but it does not appear that he parted with the possession of it, nor that the common council ordered it to be preserved or put on file. On the contrary, after having entered it at large in their minutes, they ordered it to be "published." 3. These facts, coupled with the ordinary course of business testified to by Mr. Valentine, amount to a disclaimer on the part of the corporation of any proprietary interest in the mere paper and ink constituting the letter, and warrant the conclusion that the corporation meant to content itself with the copy on its minutes, and abandon the original paper and ink to its actual possessor, or to chance; and therefore, 4. The court should have nonsuited the plain-



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tiff, in accordance with the defendants' motion; and it erred in refusing to do so; and it should have charged the jury in accordance with the defendants' proposition, that there was no evidence to show that the letter ever came into the possession of the plaintiffs, or that the right of property was ever in them.

II. The proposition submitted by the defendants' counsel, that upon the undisputed facts the statute of limitations was a bar to the action, was sound, and the court erred in refusing so to charge, and it also erred in charging that if the letter came honestly into Allan's possession, by loan or otherwise, without coming to any ownership at the same time, then the action might be maintained.

1. One undisputed fact was, that Allan had been in possession for thirty years, *claiming title to the letter as its absolute owner*, from time to time openly showing the letter as his own to various members of the corporate body.

2. Assuming it to be a true and just inference from these facts, (as the jury have found it to be,) that Allan's taking of the letter was by permission of the corporation, in the character of a borrower or bailee, then his assertion of title was an act which, without demand, constituted a right of action against which the statute of limitations began to run. (*Murray v. Burling*, 10 John. 172. *Lockwood v. Bull*, 1 Cowen, 322. *Connah v. Hale*, 23 Wend. 466. *Mitchell v. Williams*, 4 Hill, 13. *Carroll v. Cone*, 40 Barb. 220. *Davison v. Donadi*, 2 E. D. Smith, 121.)

III. The court having been requested by the defendants' counsel to charge the jury that if Mr. Allan came *lawfully* into possession of the letter, the statute of limitations was a bar to the action, and the court having answered, "there is no question about that," and the court having also charged the jury that if Allan became *wrongfully* possessed of the letter, the action was defended, the verdict must be deemed to have negatived the idea that his possession was either rightful or wrongful, which is an absurdity, and the

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verdict is against both the law as so stated, and against the evidence.

IV. The court erred in refusing to charge the jury, as requested, that by the evidence Allan came into possession of the letter lawfully and became the owner thereof.

1. The plaintiffs had averred that the letter had been taken from them wrongfully; but there was no direct evidence that that was so, while the proof was that a taking for the purpose of publication was expressly authorized by the common council, and the jury had no right to assume, without evidence, that Allan or his predecessor in the possession had purloined the letter. 2. The answer which was read in evidence, averred that he came lawfully into possession, and was the owner, and there was no evidence to contradict it.

V. There was, in fact, nothing to submit to the jury, the evidence not being contradictory, and it being the duty of the court to apply the presumptions of law arising from the evidence, even if the answer was not decisive. 1. To leave it to a jury to determine whether Allan's possession originated in theft, purchase or loan, without any thing to guide them to a definite conclusion, (if the evidence furnished by the answer is rejected,) is to substitute mere conjecture for the rational processes of the mind, and to put the rights of a suitor at the mercy of mere chance. Any verdict would have been consistent with the evidence, if the present one is, and it is impossible to tell what directed the minds of the jury to the theory which they seem to have adopted. In such a case, presumptions which are safe, and in accordance with the nature of things and the ordinary course of events, are wisely substituted by the law for mere speculation and conjecture. (*Starkie on Evidence*, vol. 2, part 2, tit. *Prescription*, p. 904. *Schauber v. Jackson*, 2 *Wend.* 37, 38.) 2. The possession of John Allan for thirty years raised a legal presumption that he had a lawful transfer of title

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from the former owner. (*Eyre v. Higbee*, 35 Barb. 502.)

3. It is more reasonably likely that the corporation by some lawful means, parted with their title to the letter, knowingly and intentionally, than that they either loaned it to John Allan, or that he stole it. They were more likely to give it away or abandon it, or to sell it, or to permit it to be sold under execution, than to loan it.

4. If, for an assumed want of corporate power to sell or give away the letter, the presumption is inapplicable to this case, then the only other presumption must be that it was parted with by some officer or agent of the corporation in breach of his duty, which, of itself, constituted a conversion and created a right of action existing more than thirty years ago, and now barred by the statute of limitations. 5. If thirty years' possession of personal property does not create a presumption of a title by grant, or of an actionable conversion, where is to be the end of replevin suits? 6. The court erred in its various refusals to charge as requested by the defendants' counsel.

*Richard O'Gorman*, for the respondents. I. The first exception appears on page 11, where the counsel for the appellants moved to dismiss the complaint upon two distinct grounds, namely: 1st. That there was no evidence that the respondents had any right of property to the letter. 2d. That there was no evidence that it was ever in their possession, and, *if it was*, there was not a sufficient foundation for a replevin suit in 1864. The first ground is disposed of by the sworn answer of the defendants, where they admit "upon information and belief, that on or about the second of May, 1785, the said letter was in the hands of the person then holding the office of mayor of the plaintiffs, and was by him produced at a common council held at the almshouse in the city of New York, on the second of May, 1785." It is established by the admission of the appellants and by the evidence, that such a letter was

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written by General Washington, in reply to the address referred to, and that it was directed to "The Mayor, Recorder, Aldermen and Commonalty of the city of New York," by the executive officer received, read, and entered upon the minutes. Can it be seriously questioned that the letter became and continued the property of the respondents, without evidence is adduced, showing some disposition of it by them? The answer to that portion of the motion to dismiss the complaint which rests upon the concession that though the letter was in the possession of the respondents, yet that fact was not a sufficient foundation "for a replevin suit in 1864," is that, until the public sale of the letter in 1864, there is nothing to show that the respondents had any knowledge, express or implied, that the same was not in their actual possession.

II. The exception, is not well taken, because the mere notoriety of possession, twenty years before, did not make the title to the letter, or establish ownership.

III. The letter itself from its address and its subject matter, imparted notice to Allan and to the world, that it was peculiarly the property of the corporation.

IV. The request to charge, that there was no evidence to show that the letter ever came into the possession of the plaintiffs, or that the right of property was ever in them, was properly refused, because of the admission in the answer and the evidence in the case; but the court left it to the jury to determine, as a fact, whether the corporation had the title and possession; and the jury found that it had.

*First.* The justice properly refused to charge that the statute of limitations was a bar to the action, but he did charge, that if Allan "obtained the letter improperly, and with the intent to convert it to his own use, wrongfully; then his suit is defensible because the conversion took place more than thirty years ago, and the action should have

been commenced within six years of that time in order to enable the plaintiffs to recover."

V. The defendants' counsel asked the court to instruct the jury that by the evidence Allan came into possession lawfully and became the owner thereof. This request was very properly declined, and for the reasons first, there was no evidence offered showing how Allan became possessed of it; and, secondly, this was a fact to be found by the jury, and was by the justice submitted to them.

*Second.* The justice charged that if the letter came honestly into the possession of John Allan, by loan or otherwise, without obtaining any *ownership* at the same time, then that this action was maintainable. The jury have, by their verdict, affirmed that to be the state of facts.

*Third.* The statute of limitations then has no application, because a demand by the corporation for the letter, and its refusal, revived the ownership thereof in them, and authorized the bringing of this action.

VI. It does not appear in evidence that the corporation had any knowledge or discovered that the letter was out of their possession, until the time of the demand and refusal, namely, on the 26th of October, 1864. This action, it appears, was brought within six years after such knowledge and discovery.

BARNARD, P. J. The facts established in this case are few, and in themselves are not the subject of dispute. On the 2d December, 1784, the common council, imbued with emotions of gratitude for the distinguished services of General Washington, voted an address to him, together with the freedom of the city, in a gold box. At a subsequent meeting of the common council, held on the 2d May, 1785, the mayor produced and read a letter from General Washington replying to the address of the corporation, which was addressed to the "Honble. The Mayor, Recorder, Aldermen and Commonalty of the city of New

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York," and subscribed by "Geo. Washington." By order of the common council the address and the reply were, published and entered upon the minutes. One John Allan had the letter in his possession about thirty years before the trial of the action, and at his death it passed into the hands of his daughter, who claimed possession up to the period of its sale, on the        day of May, 1864, when, as alleged, it became the property, by purchase, of the defendant Lent. How Allan became the possessor of the letter, is in no way shown by the evidence; nor does it appear that any offer was made on behalf of the defense to show title, other than simple possession.

The learned justice who tried the cause, charged the jury, "If there was any way in which the common council could deprive themselves of their interest in the letter and pass it to him, you will ascertain whether it is so, and you will determine whether, when he became possessed of it, he became so possessed lawfully or unlawfully."

The justice further charged, "Did the deceased, John Allan receive this paper as owner of it, when he did receive it, or did he not? If he received it as owner, and was owner of it at the time, of course this suit is defended; or if he obtained it improperly, and with the intent to convert it to his own use wrongfully, then this suit is defended, because the conversion took place more than thirty years ago, and the action should have been commenced within six years of that time to enable the plaintiffs to recover. If, on the other hand, you believe he acquired it honestly, by loan or otherwise, without acquiring an absolute property in it, at the time he received it, then the plaintiffs are entitled to recover."

We are unable to discover any error in these, the substantial portions of the justice's charge, and the questions involved having been fairly submitted to the jury, and they having found a verdict for the plaintiffs, we must conclude that in so finding they determined that Allan did acquire

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the custody of the letter honestly, without acquiring an absolute property in it.

The rule of general application, that the possession of personal property implies ownership against the world must be regarded as exceptional in certain cases.

In the present action the letter was a particular and peculiar species of property. Its style, address and responsive character to a legislative act, should of itself be regarded as having imparted notice to all, that from the moment of its reception and sending it became the property of the corporation to whom it was addressed.

Unlike other personal property, which ordinarily possesses but little, if any, distinctive mark which might place individuals upon inquiry, this letter, so written, in such terms, and so addressed, held Allan to constantly recurring notice of its ownership by the corporation.

His possession was wholly unexplained, and the jury have charitably found that he had become possessed of it, but without title by any alienation from the corporation who were originally and rightfully its possessors and owners.

No notice is shown to have been at any time given to the corporation of the possession by Allan. Had such notice been shown, the statute of limitations by appropriate lapse of time might have had application.

The judgment should be affirmed, with costs.

INGRAHAM, J. I concur in affirming the judgment upon the ground that the evidence as to title to the letter was of that character which called for a finding by the jury thereon; and such finding in favor of the plaintiffs is conclusive between the parties.

SUTHERLAND, J. (dissenting.) From lapse of time, Washington's letter, the subject of this action, has become valu-

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able as an article of virtue. It seems that it brought \$2050 at auction, in 1864. But it is not at all probable that "The Mayor, Recorder, Aldermen and Commonalty of the city of New York," to whom the letter was addressed in 1785, viewed it or treated it as property.

The evidence is, that at a meeting of the common council, on the 2d of May, 1785, the mayor produced the letter; that the letter was transcribed into the minutes of the common council, and ordered to be published, with the address to which the letter was an answer. This was all the evidence to show property in, or possession of, the letter. The presumption from the evidence is, that the letter and address were sent to the printer to be published, and that they were published, and the further presumption is that, having been transcribed into the minutes, and published, no importance was attached to the preservation of the original letter by the city authorities, and that it never came back from the printer.

Upon the evidence which has been stated, the plaintiffs rested their case, to recover the possession of the letter from the defendants, the auctioneers, in whose possession the letter was found, in 1864, nearly eighty years after the transaction as to the letter in 1785.

I doubt, under the circumstances, whether the evidence was sufficient to show property in the plaintiffs. At all events I doubt whether the evidence was sufficient to rebut the presumption, that the defendants, the auctioneers, were lawfully in possession, and as owners, or as agents of the party for whom they sold the letter as owner, viewing the letter as property.

But it is not necessary to put our decision of this case on the ground of any defect or deficiency in the proofs of the plaintiffs, or upon the *prima facie* evidence of ownership from the bare possession, at the time the plaintiffs made the demand of the letter. The evidence on the part of



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the defendants was express and undisputed, that Mrs. Stewart, the daughter and executrix of one John Allan, placed the letter in the hands of the auctioneers for sale; that he was a collector of rare manuscripts and literary curiosities; that he had a large collection of such articles; that at the time of his death, in 1863, he had been in possession of the letter for thirty years and upwards, exhibiting it to various persons from time to time, as his own.

It was a presumption of law, I think, from this undisputed evidence of long interrupted adverse possession, not only that John Allan was the owner at the time of his death, but also that the letter came into his possession lawfully and as owner. No doubt the plaintiffs might have rebutted this presumption by showing that John Allan got possession unlawfully, by a larceny, trespass, fraud or wrongful conversion; but if this could be shown, and had been shown, the statute of limitations would have been a bar to the action. I assume, too, that the plaintiffs might have rebutted the legal presumption, by showing that John Allan's possession commenced as a permissive possession; that the letter had been lent to him, or put in his hands to keep for the plaintiffs; but there was no such rebutting evidence.

There was nothing, then, to submit to a jury. It is plain that the judge, by submitting the case to the jury as he did, deprived the defendants of the benefit of the legal presumption that John Allan was the owner at the time of his death, and that his right and title commenced as owner.

If the letter is property, it must be treated as property; and the plaintiffs must prosecute their action, under and subject to the legal presumptions arising from long continued, uninterrupted adverse possession, founded on principles of public policy, to quiet possession, and to prevent

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the necessity of inquiries as to the origin of right, title, or possession, like those submitted to the jury in this case.

I think the judgment should be reversed, and a new trial ordered, with costs to abide the event of the action.

Judgment affirmed.

[NEW YORK GENERAL TERM, January 6, 1868. *Geo. G. Barnard, Ingraham and Sutherland, Justices.*]

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LAWTON and others vs. KIEL and others.

Under the Code of Procedure, the only requisites for the issuing of an attachment are that the action should be for the recovery of money; that the same should be on contract; that the plaintiff should specify the amount of the claim, and the grounds of the demand; and that the defendants should be non-resident debtors.

A claim for damages arising upon the breach of a contract by the defendant to purchase sound corn for the plaintiffs, the breach complained of being that the corn was not sound, but heated, sour and unmerchantable, arises on contract, and the amount claimed is a fixed amount, being the difference between the amount paid and the amount at which the grain was sold.

An allegation, in the affidavit, that the defendants have property in this state, is not necessary to the issuing of an attachment.

It is not necessary that the affidavit should show the issuing of the summons. It is sufficient if the summons is issued, when the attachment is obtained, and if both are delivered to the sheriff together.

If the facts are sufficient, a warrant of attachment is not void for omitting to state one of them—as that the cause of action is in an action then pending. The objection that an affidavit was sworn to before a commissioner in another state, but that no certificate of the secretary of state has been obtained as required by the statute of that state, is not fatal. The omission may be amended and supplied.

**A** PPEAL by the defendants from an order denying a motion to vacate an attachment.

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*Lawton v. Kiel.*

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INGRAHAM, J. The defendants appeal from an order denying a motion to vacate an attachment. The attachment was issued against the defendants as non-resident debtors. The claim of the plaintiffs was for damages arising upon the breach of a contract on the part of the defendants to purchase for the plaintiffs sound corn, and the breach complained of was that the corn was not sound, but heated, sour and unmerchantable. The damages claimed was the difference between the cost price and the price at which the plaintiffs sold the same.

The first ground relied on is that the damages are unliquidated, and that in such a case the Code does not provide for an attachment.

The only requisites in the Code are that the action should be for the recovery of money; that the same should be on contract; that the plaintiffs should specify the amount of the claim, and the grounds of the demand; and that the defendants should be non-resident debtors.

All these facts are contained in the affidavit. The claim arises on contract, and the amount claimed is a fixed amount, being the difference between the amount paid and the amount at which it was sold.

It is not necessary here to decide whether if the damages were really unliquidated, and not ascertained in any way, an attachment could issue. Here every thing requisite is stated, and the damages also are ascertained if the plaintiffs are entitled to recover at all. There is a fixed sum ascertained by the sales and that sum is claimed by the plaintiffs. The case of *Ward v. Begg*, (18 Barb. 139,) is a general term decision in this district, and has not, that I know of, been overruled.

I do not think the cases which have been decided as to the form of the summons should be considered as controlling in regard to the issuing of attachments. If so, non-resident debtors cannot be proceeded against here for the

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violation of contracts, even although they may have large amounts of property within the jurisdiction of the court.

The affidavit is not on information and belief. It states facts, most if not all of which are stated as within the knowledge of the party making it. That portion which states that the defendants have property in the state, on information and belief, is not necessary to the issuing of an attachment, and might have been omitted.

It is not necessary that the affidavit should show the issuing of the summons. It is sufficient if the summons was issued when the attachment was obtained. This is evidenced by the summons which accompanies the attachment, and if both are delivered together to the sheriff it is sufficient. The issuing of the summons applies rather to the time of having the property attached, than to the application to the judge.

The warrant states the existence of the cause of action, but does not state that it is in an action then pending. I do not know why the warrant was altered as it appears to have been, but still enough remains to comply with the requisites of the statute. If the facts are sufficient, the warrant is not void for omitting to state one of them.

The only objection of force is that the affidavit was sworn to before a commissioner in Kentucky, but no certificate of the secretary of state has been obtained, as required by the statute. That act (*Sess. L. 1850, ch. 270, § 4*) requires that before any such affidavit shall be entitled to be used, the certificate shall be annexed. Here it has been used by the judge, and although the objection might have been then made, still I do not think it fatal. The omission may be amended and supplied.

Unless the plaintiffs cause the certificate to be annexed to the original affidavit within ten days after notice of this decision the order will be reversed. If so annexed the order is affirmed, without costs.

*Farmers' Loan and Trust Co. v. Harmony Fire and Marine Insurance Co.*

The plaintiffs may take the original affidavit from the files for this purpose, and must return the same duly certified within that time.

GEO. G. BARNARD, P. J. concurred.

SUTHERLAND, J. dissented.

[NEW YORK GENERAL TERM, January 6, 1868. *Geo. G. Barnard, Sutherland, and Ingraham, Justices.*]

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**THE FARMERS' LOAN AND TRUST COMPANY vs. THE HARMONY  
FIRE AND MARINE INSURANCE COMPANY.**

The plaintiffs, as trustees of a railroad company, effected a policy of insurance with the defendants "on any property belonging to the said trust company, as trustees and leasees as aforesaid, and on any property for which they may be liable, it matters not of what the property may consist, nor where it may be, provided the property is on premises owned or occupied by the said trustees, and situate on their railroad premises in the city of Racine, Wisconsin." *Held* that a dredge boat belonging to the plaintiffs, as trustees, in their employ in the city of Racine, and attached to their wharf where the road terminated, was thereby in the plaintiffs' possession, and annexed to the railroad premises, and therefore covered by the policy.

The act of incorporation of The Farmers' Loan and Trust Company fully authorized the company to accept a conveyance of property from a railroad company, in trust, to secure the payment of an issue of bonds by said railroad company.

Whether such loan and trust company can hold real estate in Wisconsin must depend on the statutes of that state. In the absence of any proof of a law to the contrary, it will be presumed that the company had authority to execute the trusts which by their charter they had power to undertake.

So long as they were allowed to remain in possession and use the railroad property so conveyed to them in trust, they had such an interest as would bring all their property connected therewith, under the terms of the policy.

**A** PPEAL by the defendants, from a judgment entered on the verdict of a jury, and from an order denying a motion for a new trial, made upon the judge's minutes.

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*Farmers' Loan and Trust Co. v. Harmony Fire and Marine Insurance Co.*

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The Racine and Mississippi Railroad Company, on the 2d June, 1856, executed to the plaintiffs a trust mortgage on the railroad and its property and appurtenances, to secure its issue of railroad bonds. Default having been made in the payment of interest, the plaintiffs took proceedings to foreclose, which resulted in a surrender of the mortgaged property by the railroad to the plaintiffs as trustees or mortgagees in possession, on the 10th of May, 1859; after that the railroad was operated by the plaintiffs as trustees in possession, and was so operated when they effected a policy of insurance with the defendants, May 13, 1864, "on any property belonging to the said trust company, as trustees and lessees as aforesaid, and on any property for which they may be liable, it matters not of what the property may consist, nor where it may be, provided the property is on premises owned or occupied by the said trustees, and situate on their railroad premises in the city of Racine, Wisconsin."

The railroad company had purchased, and the plaintiffs as mortgagees and trustees, owned certain wharf property fronting on Root river. The cars came to the river, and the wharf was used for the transferring of freight between boats and cars. This action was brought to recover the value of a dredge belonging to the plaintiffs, and used to keep the water a sufficient depth in front of the wharf. It was burned during the life of the policy, March 29, 1865, in the morning, while fastened by lines to the wharf.

The only defenses were, that the dredge was not covered by the policy, and that the plaintiffs had not, by their charter, the right to be trustees of the Racine and Mississippi Railroad Company.

On the trial, the defendants insisted upon various grounds of defense, each of which was overruled by the court, and the defendants duly excepted. The court thereupon ruled that the plaintiffs were entitled to recover in this action the amount of the damages to be assessed by

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the jury. The defendants duly excepted to this decision of the court. The question of damages was then submitted to the jury, who found a verdict for the plaintiffs for \$1715.

The defendants thereupon moved the court upon the judge's minutes, for a new trial, which motion was denied, and the defendants appealed from the judgment and order.

*T. J. Glover*, for the appellants. I. The motion to dismiss the complaint ought to have been granted. 1. The plaintiffs gave no proof that they either owned or occupied the premises on which the dredge was, at the time of the fire. They offered no evidence of any paper title whatever. Conceding that the evidence tended to show occupation by them of the wharf and upland, it certainly did not show any occupation of the waters of Root river, or of the land under the waters thereof adjoining the wharf, within the meaning of the policy. Whatever may be the rights of the riparian proprietor in the bed of a navigable stream, he has no more right to the bed of the stream for the purposes of navigation as a highway than the rest of the public. The bed of the stream cannot be said to be in his occupation; it is in the occupation of the public; even when he uses it for purposes of navigation or of mooring a vessel, it is not the enjoyment of a private right of use or occupation, but the same quality and degree of right to which all the rest of the public are entitled. Whatever may be the exclusive right of ownership and occupation of a private wharf, it does not displace the public right of using the stream, and every part of it, as a highway. If the mere fact of mooring a dredge in a particular spot constitute the actual occupation of that place, so as to bring the subject within the terms of the policy, then this dredge would have been covered by the policy no matter where it might have been moored. Nothing but exclusive occupation by the plaintiffs would satisfy the

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meaning of the policy. (*Heaney v. Heeney*, 2 *Denio*, 625. *Taylor v. Atlantic Mut.* 2 *Bosw.* 106. *S. C.* 9 *id* 369.)

2. The dredge was not situate on their *railroad* premises in the city of Racine. The waters of the Root river were not, and could not be used as *railroad premises*, however convenient they might be for *railroad purposes*, that is to say, for carrying and transferring freight in connection with the railroad. Neither was the land under the waters of the river adjoining the wharf used as *railroad premises*. It is impossible to conceive of any use of it as *railroad* premises that would not interfere with the public use of the stream, which would therefore be unlawful. 3. Insurance on the dredge was substantially a *marine* risk, and manifestly not within the purview of this policy. If the plaintiffs had desired to insure it, they would, it is fair to presume, have sought full protection by a marine policy covering the dredge when exposed to greater risks at different places in the river as well as when lying at the wharf.

II. The plaintiffs never had any title to the land under the waters of the Root river, on which the dredge was afloat. 1. They were not authorized by the laws of Wisconsin to take or hold real estate in that state. 2. They were not authorized by their charter to take or hold real estate in Wisconsin. (*Miller v. Ewer*, 14 *Shep.* 509. *Middle Bridge Corp. v. Marks*, 13 *id.* 326. *Bank of Augusta v. Earle*, 13 *Peters*, 529.) 3. They were not authorized to accept the mortgage by the railroad company, given in evidence. It was not on any loan made by them to the mortgagors. It was not on any real estate in the state of New York. 4. They were equally unauthorized to accept the deed of surrender. As mortgagees in possession, their title falls with the right to take the mortgage. As trustees, their title falls because their charter does not authorize trusts (especially of land out of the state,) and also because the trusts declared are void. (*F. L. and T. Co.*



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*v. Carroll*, 5 Barb. 613.) 5. The railroad company, under which the plaintiffs claim, did not acquire any title to the lands under the waters of Root river, adjoining their wharf. (*Act of Congress, June 1, 1796, Stat. at Large, vol. 1, p. 491, § 6. Act of Congress, Aug. 6, 1846, vol. 9, p. 56, §§ 3, 7, sub. 5. Seaman v. Smith*, 24 Ill. Rep. 521. *Seneca Nation v. Knight*, 23 N. Y. Rep. 500. *Flanagan v. City of Philadelphia*, 42 Penn. R. 219. *People v. Canal Appraisers*, 33 N. Y. Rep. 461.) 6. Even though the plaintiff acquired title thereto, it was subject to the public easement as a highway, and such ownership was not within the meaning of the policy.

III. The plaintiffs were prohibited by law from taking the property and conducting the business of a railroad, and in employing the dredge in connection therewith. The policy of insurance was procured by them in furtherance of such illegal and prohibited acts, and for the purpose of saving them from loss while engaged in violating the law. The plaintiffs can therefore maintain no action thereon. (*Bartlett v. Vinor*, Carth. 251. *Gray v. Sims*, 8 Wash. C. C. 276. *Pearce v. Madison and Ind. R. R.*, 21 How. U. S. 441. *Bissell v. M. S. and N. I. R. R.*, 22 N. Y. Rep. 258, 284, 285, 301, 302, 304. *Redmond v. Smith*, 7 Man. & Gr. 474. 1 R. S. 600, § 3.)

IV. The exceptions to the admission of evidence and to the rulings of the court, and the refusal to rule as requested, are well taken.

*S. P. Nash*, for the respondents. I. The dredge was in the city of Racine. The city lay on both sides of the river.

II. By their deeds the Racine and Mississippi railroad took title to the land under water in front of the wharf to the middle of the stream, and they conveyed the same title to the plaintiffs. (*Marriner v. Schulte*, 13 Wisc. Rep. 692. *Arnold v. Elmors*, 16 id. 509. 4 id. 321, 486, 508. 2 id. 308. *Jones v. Soulard*, 24 How. U. S. 41.) The dredge was,

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therefore, at the time of the fire, on the land of the plaintiffs, and accordingly, on their railroad premises. (*See McCannon v. Sinclair*, 2 *El. & El.* 105 *Eng. Com. Law*, 53.)

III. The dredge was property of the plaintiffs, used in the legitimate business of the railroad. The policy covered every thing fairly owned by the company, "it matters not of what the property may consist." The only restriction was, that it should be "on their railroad premises in the city of Racine." The railroad premises were not confined to the tracks of the road. Depot grounds, freight houses, machine shops, stables for their horses, were all railroad premises. The wharf and the land under water in front of it were railroad premises, and while the dredge was moored to the wharf, it was on the railroad premises, as much as a car on the track, or an elevator on the land. (*See Webb v. Nat. Ins. Co.*, 2 *Sandf.* 497.)

IV. The plaintiffs had sufficient power under their charter to accept the trust in question, and to enforce it by taking possession and operating the road. But if not, the defendants, after issuing their policy and receiving the premium, are estopped from disputing the capacity of the plaintiffs.

V. The exceptions are immaterial, and should be disregarded.

*By the Court*, INGRAHAM, J. By the act of the legislature of Wisconsin, of 1848, the city of Racine extended to the centre of Root river. By the deed the Racine and Mississippi Railroad Company acquired lots 1, 2, 3 and 4, in block No. 2, as these lots are sold by the map numbers.

The dredge boat, when burned, was lying adjoining to and fastened to the wharf of the railroad company; and the principal question is whether this boat is included in the property that was insured "as any property on the premises owned or occupied by the plaintiffs, as trustees, situate on the railroad premises in the city of Racine."

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The property belonged to the plaintiffs, as trustees, was in their employ in the city of Racine, and attached to their wharf, where the road terminated.

A similar question was examined by the Superior Court in *Webb v. The National Fire Ins. Co.*, (2 Sandf. 497,) and it was held that the plaintiffs might show that it was usual to keep such timber on the sidewalk, and that it was covered by the policy.

The boat in controversy was fastened to the plaintiffs' wharf. It was thereby in the plaintiffs' possession, and annexed to the railroad premises. Had it been the property of a third person it would have been liable to wharfage and liable to a distress for rent.

No objection is made to the right of the railroad company to erect the wharf, and even if their right to do so was questioned, still they were in actual possession, and until removed therefrom, the property they had thereon was covered by the policy.

As to this boat, the evidence warrants the conclusion that she was so attached to the wharf as to make it upon the property of the railroad, within the description contained in the policy.

The other objection is to the capacity of the plaintiffs to take such a trust. The act of incorporation fully authorizes a trust created by deed such as this was. Whether they could hold real estate in Wisconsin would depend on the statutes of that state. In the absence of any proof of a law to the contrary, we must presume that the company had authority to execute the trust, which by their charter they had power to undertake. So long as they were allowed to remain in possession and use the railroad property, they had such an interest as would bring all their property connected therewith under the terms of the policy.

The judgment should be affirmed.

[NEW YORK GENERAL TERM, JANUARY 6, 1868. *Geo. G. Barnard, Sutherland and Ingraham, Justices.*]

**EMERSON vs. BOOTH and REEVE.**

Where the plaintiff in an action for the claim and delivery of personal property, dies after the execution of an undertaking to him by the defendant for the purpose of regaining possession of the property, and before the trial, and another person is substituted in his place, as plaintiff, the person so substituted is the party entitled to recover, and as such, the undertaking takes effect in his favor as the plaintiff entitled to a return of the property.

The defendants' liability becomes fixed, on the recovery of a judgment by the plaintiff, either to return to the plaintiff the property, or to pay the value of the property to the extent of the penalty.

In an action upon an undertaking given by the defendants, in an action for the claim and delivery of personal property, judgment may be rendered for the penalty of the undertaking and interest thereon from the date of the judgment.

Points not raised on the trial, cannot be urged on appeal, for the first time.

**A**PPEAL by the defendants from a judgment entered on the trial of this action before a justice of the court, at the circuit, without a jury. The action was brought upon an undertaking given by the defendants in an action for the claim and delivery of personal property, for the purpose of securing the delivery of the property described in it to the plaintiff in that suit, &c.

The justice found the following facts, viz :

1st. That on the 29th day of November, 1859, William Montgomery, of Yonkers, Westchester county, executed and delivered to Robert Grant, now deceased, a general assignment for the benefit of his creditors, the assigned property consisting in part of a machine shop, engines, machinery, tools and fixtures, known as "William Montgomery's Machine Works," in the village of Yonkers, and that on that day the said Grant, as assignee, took possession of the same, under and by virtue of said assignment.

2d. That on the 22d day of December, 1859, William Bleakley, then sheriff of the said county of Westchester, seized and took into his possession the said shop, machinery and works, under and by virtue of a certain execution issued out of the Supreme Court, in favor of one Alfred

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Booth, against the said Montgomery and one William Garrabrant, on the 17th day of December, 1859, for \$2268.38.

3d. That on the 9th day of January, 1860, the said Robert Grant, as assignee, brought his action in the Supreme Court against the said Bleakley, sheriff, to recover possession of said property from him, and in said action claimed and required the immediate delivery to him, said Grant, of the property described in the complaint in this action, alleged to be of the value of not less than \$3000, and of the real value of at least \$15,000.

4th. That upon making such claim and requisition for the immediate delivery and possession of said property, said Grant executed and delivered for the benefit of said Bleakley, an undertaking in the penalty of \$6000, as required by section 209 of the Code of Procedure, for the enforcement of the same; that the said requisition and papers upon said claim, including said undertaking, were delivered to William H. Lawrence, then a coroner of said county, and the said coroner took said property into his possession, under and by virtue of the same, and in pursuance of the statute.

5th. That on or about the 17th of January, 1860, the said coroner, still having possession of said property, and the said Bleakley requiring the return of said property to him, by virtue of the statute, the defendants, for the purpose of procuring the return of said property to said sheriff, executed and delivered to said Grant, assignee, a counter undertaking, as required by the 211th section of the Code of Procedure, in the penalty of \$6000, conditioned for the return of said property to said Grant, (then plaintiff,) if delivery thereof should be adjudged, and for the payment of such sum as should for any cause be recovered against the said Bleakley, the defendant.

6th. That upon the receipt of said undertaking, and by virtue thereof, the said coroner delivered up to the said

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Bleakley, the said property, and the said Bleakley again took the same into his possession.

7th. That on the 28th day of September, 1861, the said action for claim and delivery being still pending and undetermined in said court, the said Robert Grant departed this life.

8th. That on the 23d day of October, 1861, upon the petition of the said William Montgomery, and the written consent of said Bleakley, by a special order of the court for that purpose, duly made on that day, the plaintiff was duly appointed successor of said Grant in the execution of the trusts under the said assignment, pursuant to statute, and was duly substituted in the place of said Grant, as the plaintiff in said action, and that he then became, and ever since has been, the plaintiff therein.

9th. That such proceedings were thereafter had in said action, and upon such claim for the immediate delivery and possession of such property that on the 30th day of March, 1863, the plaintiff recovered a judgment therein against the said defendant, Bleakely, for the return of said property to said plaintiff, and if return thereof could not be had for the value thereof, assessed with damages of detention, at \$16,229.05, and for his costs of said action adjudged at \$1128.96, in all \$17,358.01; that said judgment, in due form, was duly docketed in said county of Westchester, on the said 30th day of March, 1863, and still remains on record therein, and in full force.

10th. That on the 4th day of September, 1863, the plaintiff, by his attorney, duly issued and delivered to the present sheriff of Westchester county, an execution upon said judgment, commanding him to return the said property to the plaintiff, if a return thereof could be had, and to collect the damages and costs; and if a return thereof could not be had, then to collect the value thereof so assessed, together with the damages for detention and costs.

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11th. That on the 31st day of October, 1863, the said sheriff returned the said execution to the office of the clerk of Westchester county, wholly unsatisfied.

12th. That said judgment and execution remain wholly unsatisfied, and that no part of said property has ever been returned to the plaintiff, but that the same has been disposed of by said Bleakley, and is incapable of being returned, and that no part of said judgment has ever been paid.

And as matter of law, the said justice concluded that the plaintiff was entitled to recover judgment against the defendant in this action, for the sum of six thousand dollars, being the penalty of said undertaking, together with one thousand one hundred and twenty dollars, the interest thereon from the 30th day of March, 1863, amounting in the whole to seven thousand one hundred and twenty dollars. And he directed that judgment be entered accordingly with costs, and an allowance of one hundred dollars.

*R. W. Van Pelt*, for the appellants.

*S. E. Church*, for the respondent.

*By the Court*, INGRAHAM, J. The substitution by the parties of Emerson as plaintiff, made him the party entitled to recover, and as such the undertaking took effect in his favor as the plaintiff entitled to a return of the property. The defendant's liability became fixed on recovery of the judgments—either to return to the plaintiff the property or to pay the value of the property to the extent of the penalty.

This point does not appear to have been made on the trial. If not it cannot be taken here, because it might have been obviated by further proof if necessary. There is nothing in the other objections, calling for any notice, except that in regard to the allowance of interest beyond

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the penalty. The judgment was for a larger sum than the amount fixed in the undertaking. This warranted a recovery for the whole amount stated therein as the penalty. No more could be recovered thereon, either for principal or interest up to the date of the judgment, (*Lyon v. Clark*, 8 *N. Y. Rep.* 148,) inasmuch as the undertaking was not one merely for the payment of money, but conditioned for the return of the goods. (*See cases cited, pages 153, 154.*) That judgment was rendered on 30th March, 1863. In the present case, judgment was rendered for the plaintiff for the penalty of the undertaking and interest thereon from the date of the judgment. This was in accordance with the decision of the Court of Appeals in *Brainard v. Jones*, (18 *N. Y. Rep.* 35.) That action was on a replevin bond, and the recovery was for the penalty and interest. The defendants, although sureties, were held for interest beyond the penalty, upon the ground that after the recovery they were in default and bound to pay the penalty. A neglect to pay after that date made them in the wrong, and interest was due from them as in any other case, where money is not paid, when the creditor becomes entitled to it.

COMSTOCK, J. says: "The question is, what does the law exact of the obligor from an unjust delay in payment, after his liability is ascertained and the debt is actually due from him?" Interest was allowed in that case on the penalty.

Judgment should be affirmed, with costs,

[NEW YORK GENERAL TERM, January 6, 1868. *Geo. G. Barnard, Ingraham and Sutherland, Justices.*]



GEORGE V. HOYLE and JOHN K. MYERS, trustees, &c. in place of EDWARD BEMENT, survivor, &c. deceased vs. THE PLATTSBURGH AND MONTREAL RAILROAD COMPANY, SAMUEL F. VILAS and others.

The more sensible rule, in regard to what are to be deemed fixtures, seems to be that if articles are essential to the use of the realty, have been applied exclusively to use in connection with it, are necessary for that purpose, and without such or similar articles, the realty would cease to be of value, then they may properly be considered as fixtures, and should pass with it.

The doctrine that the rolling stock of a railroad company in all cases is to be considered as personal property, and as not passing under a mortgage of the road and its appurtenances, not acceded to.

Where it was found by the referee, and was conceded, that a mortgage of its road and franchise, executed by a railroad company, was sufficient to include in the mortgaged property the rolling stock, and the parties intended that the rolling stock and equipments of the road should pass, as a part of the road and as necessary to its use; the object of the mortgage being to provide funds for the building of the road and preparing it for travel, and the intent of the parties was to secure the bondholders by a mortgage on the whole property in the road as used by the company for travel; *Held* that such a construction should be given to the instrument as to include therein the rolling stock, although not expressly named.

The 28th section of the general railroad act, (*Laws of 1850, p. 211.*) authorizing railroad corporations to borrow money for the building of their roads, or operating them, and to mortgage all their corporate property and franchises to secure the payment thereof, contemplates a mortgage of all the property, whether land, road, rolling stock or franchise, and warrants the conclusion that it was the intent of the legislature that the whole should be included in one mortgage and treated as a mortgage of the road and its accessories. Such a mortgage need not be treated as a chattel mortgage, and filed as such, in order to give it validity as against judgment creditors.

THIS action was brought to foreclose two mortgages held by certain trustees, (since deceased, for whom the plaintiffs are substituted,) on the railroad and equipments of the Plattsburgh and Montreal Railroad Company. The defendant Vilas alleged in his answer, in substance, that the mortgages had never been filed as chattel mortgages, and that the *rolling stock* had intermediate the giving of the mortgages and the commencement of this suit been sold on execution and bought in by him. Thereupon the

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decree (which was made by consent) directed a sale of the mortgaged lands, railroad, buildings, docks, &c. but ordered the referee, before selling the rolling stock in question, to inquire whether it or any part of it was "subject to the lien of the said two mortgages or either, and which of the same." The referee was also ordered to report separately, from time to time, as to any particular subject referred to him, and he or either party had leave to apply at any time for further instructions. The referee subsequently reported, in respect to the matters so at issue between the plaintiffs and Vilas. Both parties excepted to the report: The plaintiffs to the conclusion of law that the mortgages were void as against creditors for want of filing; and to the *final* conclusions of law, that the property ceased upon its purchase by Vilas, to be "subject to the lien" of the plaintiffs' mortgages, and that the plaintiffs have no lien thereon.

The defendant Vilas excepts to the findings as to the cost of the property to him, and the surplus in his hands; and to the conclusion of law that the railroad company had a right to redeem from him because he was a trustee; and to the conclusion that he was a trustee. The exceptions were heard at special term, before Justice SUTHERLAND, who decided that the mortgages, under which the plaintiffs claimed the rolling stock in question, assuming that they are worded so as to cover it, should not be deemed, as to it, within the purview or intent of the act of 1833; and that they were not void as to the defendant Vilas, because they were not filed as chattel mortgages in pursuance of that act. And the exceptions of the plaintiffs to the conclusions of law of the referee were sustained, and held to have been well taken. (*See 47 Barb. 104, S. C.*)

From the decision of the special term, the defendant Vilas appealed to the general term.

*G. M. Beckwith & Son*, for the appellants. The learned Judge, who reviewed the decision of the referee, after

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coming to the conclusion, that the rolling stock of a railroad is personal property, says, "that the act (of 1833, requiring chattel mortgages to be filed) was not intended to apply to a mortgage of a railroad and rolling stock on it." With all due respect for the very ingenious argument of the learned judge we beg leave to dissent, and to give briefly a few reasons therefor. He starts by expressing a doubt, whether a domestic or foreign corporation is a resident or a non-resident within section 2 of that act. (*Laws of 1833, p. 402.*)

I. A domestic corporation is deemed in law to have a residence in the state, and its residence is to be determined by its place of business. It may not have a domicile, but it has a residence. If it is created by the laws of this state it has a residence at its place of business. (*Pond v. The Hudson River R. R. Co.*, 17 How. 543. *Conroe v. The National Protection Co.*, 10 id. 403. *Louisville R. R. Co. v. Letson*, 2 How. U. S. 479. 2 Abb. Dig. 132.) For all purposes, a corporation is deemed in law to be a resident of the state, by which it is created and within which it is doing business. But the learned judge seems to have overlooked the express provision of section 1 of that act, which provides that "every mortgage or conveyance intended to operate as a mortgage of goods and chattels, hereafter made, &c. shall be filed," &c. There is no exception. It matters not by whom made. It requires every chattel mortgage, thereafter made, to be filed. The reasons, for requiring it in the case of individuals, apply with equal force to those, given by associations and corporations. It is no answer to say, that the legislature did not have in their mind railroad companies, for it is as clear, that they had in mind those companies, as that they had in mind the case of a married woman, who, at the time of the passage of that act, could not give a chattel mortgage—since that time general laws have been passed, authorizing the creation of corporations for various manu-

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facturing and other purposes, that were at the time wholly unknown and which have grown out of the discoveries of science, and demands of society, such as telegraph and express companies and the like. Section 2 prescribes the place of filing. It declares that such mortgages "shall be filed in the several towns and cities of this state, where the mortgagor therein, if a resident of this state, shall reside at the time of the execution thereof, and if *not a resident*, then in the city or town where the property so mortgaged shall be at the time of the execution of such instrument." If, therefore, the above authorities are sound, then the company was for all purposes a resident of Plattsburgh. But if that is not correct, still we insist that the language of the first section required the chattel mortgage to be filed, for it provides that all chattel mortgages *thereafter* given shall be filed; and section 2 required it to be filed in Plattsburgh, where the company's place of business was at the time, if the company was in law a resident of this state, and if *not a resident*, then where the property was. The company was a resident or not. If it was not a resident then the mortgage should have been filed in Plattsburgh. The statute does not use the word "non-resident," but says "if not a resident." If the company did not reside in this state, then it is, in the language of that section, "*not a resident*." It is clear, that the legislature had in mind all chattel mortgages thereafter given. The then existing evils, intended to be remedied, show, as well as the language used, that such was their intention. If railroad mortgages were not included, then by what rule are other corporations included.

II. The learned judge says, "now a foreign corporation can own and operate a railroad in this state, and if the New York and Erie Railroad was owned and operated by a foreign corporation, and it should mortgage its road and rolling stock, where? in what town or towns or city should the mortgage be filed?" We answer in the language of the

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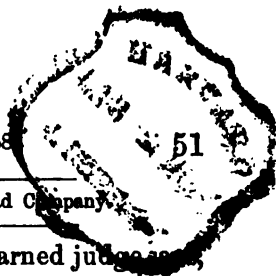
statute, "where the property was at the time of the execution of the instrument." The inconvenience to the mortgagee is no answer to the positive requirements of the statute. Many individuals residing in other states are, within my knowledge, carrying on large lumber and iron business in this state, and have large quantities of personal property scattered through different towns and counties, yet no one will say that their mortgages need not be filed in all the towns where the mortgaged property is situated at the time of their execution. Railroad companies are not likely to give small mortgages. If given, they are generally for large sums. Hence the mortgagees in such cases can well afford to be at the expense and trouble of filing their chattel mortgages. But it is further clear, that the legislature intended that such mortgages given by persons or companies, not residing in this state, should be filed, and filed where the property was at the time of the execution thereof, for the first section provides that the mortgage, *or a true copy thereof*, shall be filed. Now why authorize a copy to be filed, unless it was intended to cover the very case put by the learned judge such as property located in different towns. The learned judge says: "Section 3 of the act, providing for a renewal of the mortgage, &c. evidently contemplates a change of residence of the mortgagor, for the copy is to be filed, where the mortgagor then resides." True, but does that apply to any mortgagor, except a resident mortgagor? clearly not. For suppose a man residing at Alburgh in Vermont, who is carrying on business in this state, and there are in our county many such, should mortgage his personal property in this state, his mortgage would have to be filed in the town where the property was at the time of its execution. And suppose that just before the expiration of the year, such mortgagor should remove from Alburgh to Burlington, Vermont, would it be necessary to file the

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copy of the mortgage in Burlington? Most clearly not. The statute means no such thing. It applies only to resident mortgagors, where it says, the copy must be filed in the office of the clerk, where the mortgagor resides. Again, the learned judge says: "A change of residence is scarcely predicable of a railroad corporation." Why not, if its place of business is to be deemed in law its place of residence? should it change its place of business, it will be very likely notorious. Again the learned judge says: "In the second place I doubt whether a mortgage of a road and rolling stock on it, should, as to rolling stock, be deemed a mortgage of goods and chattels within the intention or provision of the act." If the rolling stock is personal property, then the mortgage is of personal property, as well as of real estate. But it is very easy to express a doubt. What is needed in law is certainty. The learned judge goes on to speak of railroads as something new in 1833, as great public improvements and the like. Grant it. What does that prove? Does it prove, that if I should sell to a railroad company, firewood, iron or cars, and take a mortgage on it, or on other personal property, I need not file it? Why should I not be required to file my mortgage? Is it enough to to say to me, your mortgage is given by a company, who has built a road of great public improvement, or has constructed something that was new in 1833, therefore you need not file it, but you may keep it a secret, and let the company on the credit of its property obtain credit from others. It will be observed, no duty is imposed on the company after it has given its mortgage, in regard to filing it. That is the mortgagee's duty. Suppose the company should take a chattel mortgage, would it not be required to file it, or a copy to preserve its lien? The whole argument of the learned judge on that point seems to me to be founded on a mistaken view of the case. I see no good reason, why persons dealing with a railroad company, should not be bound by a general statute, as much as when



dealing with an individual. Again, the learned judge, in speaking of a certain railroad company: "Their road could not be abandoned or transferred without the consent of the legislature," &c. It may be that such was the case in the instance of the road he refers to; but such was not the case of the Plattsburgh and Montreal Railroad Company. But suppose it was, what does it prove? It certainly does not prove that they could not sell their cars or other personal property and buy others to supply their places. But suppose they could not transfer their road, or do any act, such as giving a mortgage on it, by which it might be taken from them, they could sell their cars, or part of them; hence it is quite clear, that a chattel mortgage might be given on their cars or part of them. The argument, therefore, is to my mind unsound, so far at least as it applies to personal property. The legislature may have supposed railroad companies would not mortgage their roads, but they had no reason to suppose so as to their personal property. Religious corporations cannot sell their real estate without leave of court, but they can mortgage it to secure an honest debt. (*Manning v. Moscow Presb. Society*, 27 Barb. 52.) *South Bapt. Society v. Clapp*, 18 id. 35.) The learned judge also expresses the opinion, that such mortgages do not come within the mischief or frauds intended to be prevented or remedied by the act. He remarks that the main purpose of this act of 1833, was to prevent persons obtaining credit, as absolute owners of goods and chattels in their possession, which they had mortgaged. Railroad companies in operating their roads, expend a larger portion of their earnings than any other, except perhaps mercantile. They have occasion to buy large quantities of personal property, to furnish and keep furnished their stations, and supply fuel, iron, cars and their shops. Citizens are constantly dealing with them, as this case shows, by the great number of judgments against this short road. Such roads being appa-

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rently in successful business and possessed of a large amount of personal property, by buying or building new cars and other property, obtain a credit of citizens, who, if their mortgages are not filed, have no opportunity to learn their true condition. Mortgages on their real property are generally given soon after their road is built and before their road is half supplied with rolling stock and other necessary things. People do not suppose any thing *more* to be mortgaged than their road. Such was the fact in this case. Had it been known that all their rolling stock was mortgaged, they would not have obtained the credit in half of the cases in which they did. Persons supplying a railroad with the means of operating their road, should have the means of ascertaining whether their property is incumbered. In no case is there a greater necessity of being able to learn the facts. Every road in the country has been mostly built, or at least furnished with rolling stock and the means of operating, on credit. Hence the necessity of a compliance with the statute.

There is no reason why persons taking mortgages from corporations should not be required to file them. There is an impression among the people that large and powerful railroad corporations control almost all the interests of the state and make every thing that opposes their interests or wishes to yield. Nine tenths of the corruption charged on the legislature originates, as it is said, with railroad companies. Many people are alarmed at the power which such roads exert at elections, and in many other respects. Our only hope is that our courts at least will stand between such powerful and unscrupulous institutions and the people, and hold them to the same rules of law that it does individuals.

But the learned judge remarks, that railroad companies could not in 1833, mortgage their franchise without the consent of the legislature. Suppose that be so, that is not the question before the court. Could they then not buy and



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sell their personal property? Most certainly they could, before the act of 1850. All corporations had the common law right to buy personal property, necessary to carry out the object of their incorporation, unless expressly prohibited by their charter. (*Beers v. Phenix Glass Co.*, 14 Barb. 358.) And corporations have power to borrow money necessary to carry on their business; and this they had power to do before the act of 1833; and they have also the necessary power to give obligations for its repayment, in any form not expressly prohibited by law. (*Curtis v. Leavitt*, 15 N. Y. Rep. 9.) If so, then they could mortgage their property, and this must have come within the intention of the legislature. Suppose a railroad company wants land for a depot, and for storing property being transported by them. They make a bargain to buy a lot for that necessary purpose, but not being able to pay down, they buy on credit. Could they not give a mortgage to secure the purchase money? Most clearly they could; for the plain reason that the vendor, if he gave a deed and took back no security for the purchase money, would have an equitable mortgage for the unpaid purchase money as against the company. Certainly the law never forbids a party from doing what it will enforce, to the same extent as if it had never been done. It could not mortgage its franchise without the consent of the legislature, but it could secure its honest debts, not on its franchise, but on its property. If then it could mortgage its real estate, it could also mortgage its personal property. Now a religious corporation cannot sell its real estate without leave of court, but it can mortgage it to secure an honest debt. (27 Barb. 52. 18 id. 35.) If a party having an honest debt against a railroad company could not take a mortgage, before 1833, on the property of the railroad company with its consent, then certainly it ought not to have the right to obtain a lien by a judgment, but such companies should be treated as receivers. But such is not the law, and never has been.

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Then it is clear that railroad companies could mortgage their property before 1833, and especially their personal property, and if so then the legislature intended to require their mortgage of goods to be filed, not by the company, but by the person taking it.

*John N. Whiting*, for the respondent. I. The rolling stock on this railroad was *not personal*, but *real* property. It is to be regarded as fixtures, or in the nature of fixtures, annexed to the land mortgaged. The question whether it is real or personal property is discussed in three cases in this state, the *Farmers' Loan and Trust Co. v. Hendrickson*, (25 Barb. 484;) *Stevens v. The Buffalo and New York R. R. Co.*, (31 id. 590;) and *Beardsley v. The Ontario Bank*, (*Id.* 619;) and in this case. These decisions are as nearly as may be balanced in respect of authority, there being on each side the decision of able jurists, and the unanimous opinion of a general term.

In respect to the disagreement between these authorities, it should be observed that the objections in the two cases in 31st *Barbour* to the positions of the case in 25th *Barbour* apply with as much force to the instances in which it is not denied that the things in dispute were fixtures, as to those in which it is claimed that they were not. The *reductio ad absurdum* so freely resorted to in the cases from the fifth and eighth districts proves too much. The hop-poles, for example, in *Bishop v. Bishop*, (1 Kern. 123,) and the manure, in *Goodrich v. Jones*, (2 Hill, 142,) the log-chain in *Farrar v. Stackpole*, (6 Greenl. 154,) and the steelyard in *The King v. St. Nicholas Gloucester*, (*cited in* 20 Wend. 259,) to say nothing of the pigeons, deer, keys, &c. always referred to in fixture cases, were as much subject to be removed, sold, &c. and in point of custom are as often actually removed, sold, &c. as the rolling stock on a railroad. When so removed, they are "severed;" and by being severed become personal property. But their capa-

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city to be severed and so converted into personalty was never held, or supposed to take them out of the category of fixtures. The question is, what were they *intended for*? what is their *primary* use? All fixtures are in some respects anomalous in their characteristics; railroad rolling stock is no more so than others. Looked at in some aspects, all may be considered annexed to the realty; considered in others, all are undoubtedly personal property. It is, therefore, insisted that the distinctions taken in the cases in 31st *Barbour* are not real, and leave the authority of the prior decision in the second district unshaken.

It nowhere appears that the rolling stock in question had been actually off the Plattsburgh and Montreal railroad; and it does affirmatively appear, that when levied on and sold to Vilas, it was standing on the track of the Plattsburgh and Montreal railroad, annexed thereto. The referee finds that the mortgages cover the cars, engines and other articles enumerated under the name of equipment. To this there is no exception. He decides that as to equipment they are chattel mortgages, and that they were not filed as such; but were recorded as a mortgage of real estate. It becomes, therefore, important to inquire what is a mortgage of a railroad and the franchises of a railroad company. It can hardly be said that franchises are real estate. A railroad is built on land, and embraces specific rights and powers, and requires the use of specific articles. When the entire undertaking is mortgaged as an entire thing, including the roadway, franchises and equipment, it treats the whole as a unit, and conveys to the mortgagee a thing capable of being enjoyed. Chattels connected with the enjoyment of the realty, and convenient for its useful enjoyment, are held by the courts to be so related to the realty that they will pass by a general conveyance; thus, hop-poles, manure, fence rails, etc. all pass under a deed of real estate, although not mentioned *in numero*. It is because good husbandry requires the use of these chattels, that although personal

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of themselves, they shall not be severed from the land by a grantor after sale. The equipment of a railroad is as much a part of it, in common parlance, as the rails, ties, switches, or bridges. It is as necessary to its use as a railroad, as hop-poles, rails, manure, &c. to a farm. When we speak of a railroad we speak of the whole thing. When a railroad and franchises are conveyed, the whole undertaking is conveyed, and we insist that a mortgage of a railroad and franchises *ex vi termini*, carries the equipment, it carries all that is connected with the railroad necessary to enjoy the franchise. Public convenience requires that this should be so. It can never have been intended that when railroads are built, they can be destroyed by operation of law, one creditor seizing one part, and another another part. And such a conveyance being recorded as a mortgage, gives it sufficient publicity and answers all the original purpose of the statute, and will promote public convenience. We therefore insist that when the owner treats a railroad, its franchises, equipments and appurtenances as an entire thing, and mortgages them all as one thing to innocent purchasers, who part with their money on the faith of its being conveyed as an entirety, the title of the mortgagee is to the whole thing conveyed, and he is not liable to have his title divested by parties posterior in interest, by mere operation of law.

II. The mortgages were not void as to the rolling stock for want of filing or of change of possession, even though the rolling stock in question is to be considered personal property. For the reason that the statutes which declare chattel mortgages, unaccompanied by possession, void as against creditors, have clearly no application to the rolling stock of railroads. 1. The courts have always felt bound to hold, in construing statutes, that cases not within the intention of the legislature were to be excepted from the operation of the statute, although entirely within the letter. "A thing which is within the

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letter of the statute is yet not within the statute, unless it be within the intention of the makers." (*The People v. Utica Ins. Co.*, 15 *John*. 381.) And the courts have always assumed to judge of the intention of the legislature, from all the circumstances of the case. Such constructions by the courts have been numerous from Coke's time down.

2. The inapplicability to rolling stock of all the statutes and judicial constructions holding chattel mortgages void for want of change of possession, is obvious from a consideration of the duty of railroad companies to afford transportation to the public, the performance of which duty is the object of their creation, and which duty cannot be performed without the possession of the rolling stock, and as to which the strict terms of the statute are incapable of fulfillment. (See *Pierce v. Emery*, 32 *New Hamp. Rep.* 504; *Rex v. Severn and Wye R. R. Co.*, 2 *B. & Ald.* 646; *Rex v. Eastern Counties R. R.*, 10 *Ad. & Ellis*, 531; *Rex v. S. Wales R. R. Co.*, 14 *id. N. S.* 902; *Clark v. Washington*, 12 *Wheat.* 46, 54; *Winchester and L. Turnpike Co. v. Vimont*, 5 *B. Monroe*, 1; *Arthur v. Comm. and R. R. Bank*, 9 *S. & M.* 394; 13 *S. & R.* 210; 9 *Watts & S.* 27; 5 *id.* 265.)

III. However the foregoing questions may be decided, it by no means follows that the plaintiffs' mortgages have lost their lien on the rolling stock in question. The defendant Vilas has always been a director of the Plattsburgh and Montreal Railroad Company, whose property the rolling stock was. A director of a corporation is a trustee for it. His duty as such trustee is to seek its advantage in every just way. If its property is levied on by execution creditors, it is his duty to do all that he can to have the property sold to the best advantage. He cannot, of course, become himself a purchaser at such sale, for that would bring his private interest as purchaser into conflict with his duty as trustee. While, therefore, it seems to be conceded that a director of a corporation may, for his own just debt, recover a judgment against the corporation, and

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have its property applied by sale to the satisfaction of the judgment, such an operation being in judgment of law and morals a mere exchange of equivalents, it by no means follows that at such execution sale *he may himself become the purchaser* of the corporate property sold. On the contrary, such a purchase is against his duty to the stockholders, and voidable as against them. In the present case, for about ten thousand dollars, Mr. Vilas bought property, a *portion* of which, after several years hard service, was valued by his assent at \$18,000; and among other items he bought a locomotive and cars for a little over \$3000, which he sold two years and a half afterwards for \$7500. Even a mortgagee, who owes no other duty to the mortgagor than what arises out of the mortgage relation, cannot at a sale under the mortgage, judicial, no more than extra judicial, purchase at the sale, without leave from the court or the statute; and *a fortiori* a director of a corporation who, with his associates, has the exclusive charge of the corporate property and business, cannot speculate upon that property to their disadvantage. (1 *Kern*. 266. *Cumberland Coal Co. v. Sherman*, 30 *Barb.* 571.)

IV. The purchase of the rolling stock by Vilas was voidable by the plaintiffs as prior mortgagees of the property, as much as by the railroad company themselves. The plaintiffs are assignees of the company—as much entitled to redeem from Vilas as they would have been from a tax sale subsequent to their mortgage. (*See Iddings v. Bruen*, 4 *Sandf. Ch.* 277.)

V. Neither could the plaintiffs' right to redeem be affected by the act of the railroad company in hiring the rolling stock from Vilas, nor by any other act of theirs. The railroad company themselves would not be precluded, by hiring the stock from Vilas, from redeeming. For the only obligation of a tenant is to restore the possession to his landlord. Having done that, and relinquished the advantage his lease gave him, he may

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then dispute his landlord's title. Their right to *redeem*, however; is not at all inconsistent with no impeachment of his title *before* redemption. *Until* redemption, they might hire from him without prejudice to their own right *after* redemption. Moreover, a trustee's purchase of the property of his *cestui que trust* cannot be confirmed by the latter, except he is free from all distress or necessity. (*Lewin on Trusts*, 8 Law Library, N. S. 391, cited 30 Barb. 575.) But the railroad company were under the absolute necessity to get the use of their rolling stock, and having no money to buy, must hire. The same considerations apply to the receiver in this cause, as respects his act in hiring the property from Mr. Vilas. He was, however, no grantor of the plaintiff, nor his agent, and his acts, whatever they may have been, cannot prejudice the plaintiff.

VI. It is true that a trustee, whose purchase of the property of his *cestui que trust* is invalidated upon the principle referred to in the second point, is allowed the amount paid by him for the property, deducting all sums received by him by means thereof. In the present case Mr. Vilas paid for the rolling stock and other property. But he has received, for locomotive and tender, passenger cars, hire of rolling stock, &c. \$16,317.74. He has, therefore, a surplus of money on hand, (as the referee finds,) and the residue of the rolling stock, not sold by him, but now in his possession, stands already redeemed.

VII. The defendant Vilas is not a *bona fide* creditor or purchaser, within the contemplation of the statute. 1. He was a director of the railroad company at the time of the execution of the mortgages, and remained a director until after the personal property was purchased by him. As such director he stood in a fiduciary relation to the mortgagees, and he was bound to protect their interests in the property mortgaged. 2. The property was left in Vilas' possession (with others) to manage and protect. He cannot be permitted to purchase the property and so enrich

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himself at the expense of the trust, or to defeat the purpose of the mortgage. 3. The assent of the mortgagor or receiver, or their hiring the property, cannot affect the rights of the holders of the bonds. Even, then, if the mortgages, *quoad* the equipment, are chattel mortgages, Vilas does not stand in a position to object to the want of filing.

VIII. If the mortgages be regarded as chattel mortgages not filed, yet they are good against Vilas, because he had notice of them. They can only be void as against creditors and purchasers in good faith. It is clearly settled that a subsequent purchaser or mortgagee, having notice of an unpaid chattel mortgage, cannot set up the want of filing. (*Gregory v. Thomas*, 20 *Wend.* 17. *Sanger v. Eastwood*, 19 *id.* 514. *Hill v. Beebe*, 13 *N. Y. Rep.* 566. *Lewis v. Palmer*, 28 *id.* 271.) The object in filing is the same as the recording of deeds of lands. It is universally held that notice of an unrecorded deed is equivalent to registration. Registration is but constructive notice, and actual notice prevents the mischief sought to be remedied by the recording acts. (*Gregory v. Thomas*, and *Sanger v. Eastwood*, *supra*. *Meech v. Patchin*, 14 *N. Y. Rep.* 71.) This conclusion cannot be avoided except by holding that the *bona fides*, mentioned in the statute, is wholly immaterial so far as creditors are concerned. And then we have a statute enacted to prevent frauds, which, by construction, will enable an agent, having a power of attorney to make a chattel mortgage for his principal, to seize the property mortgaged immediately after the execution of the mortgage, and before the mortgagee has time to get it on file; and appropriate the property to his own use. This can only be avoided by holding the *bona fides* equally applicable to creditors, mortgagees and purchasers.

INGRAHAM, J. Two questions are submitted to us on this appeal. One is whether the rolling stock of a rail-



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road is to be considered as fixtures passing under a mortgage on the road and franchises; the other, whether if it is personal property merely, and not to be regarded as fixtures, a general mortgage of the company on the whole road, its equipments and franchises, must necessarily be filed as a chattel mortgage to give it validity against a judgment creditor. The first question is one for which authority may be found on both sides, and even in this state we find contradictory decisions on this question.

In *The Farmers' Loan and Trust Co. v. Hendrickson*, (25 Barb. 484,) it was held that the rolling stock are to be deemed fixtures, and will pass under a mortgage on the road, as such. This was decided by the general term in the second district.

In *Stevens v. Buffalo and New York City R. R. Co.* (31 Barb. 590,) the same question was before the general term of the eighth district, in which they held that the rolling stock of a railroad, as between mortgagee and judgment creditors or purchasers, was personal estate, did not pass under a mortgage as fixtures, and could not be held under the mortgage as personal estate, unless the same was filed as a chattel mortgage, pursuant to the statute. This case was followed at a special term in the fifth district, before Allen, justice, who concurred with the judges in the eighth district.

These contradictory decisions of general terms in this court leave the question still unsettled, so far as any adjudications here can be relied on.

In the *Minnesota Co. v. St. Paul Co.* (2 Wallace's U. S. Rep. 609,) the question was discussed, and was referred to by Justice Nelson in a dissenting opinion upon another point. He says: "We agree that the rolling stock upon this road, was covered by the several mortgages, and as respects any other valid liens upon the same, is inseparably connected with the road; in other words is, in technical language, a fixture to the road, so far as in its nature and use it can be

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called a fixture; and is a fixture extending over the entire track of the road."

In an able note annexed to that case, the subject is fully discussed, and the conclusion arrived at, that rolling stock was a fixture, and passed under a conveyance of the road. (*P. 646.*)

Similar decisions have been made in *Pierce v. Emery*, (32 *New Hamp. Rep.* 484,) and other cases there cited. I refer to the various citations in the cases above noted, and to *Redfield on Railways*, p. 576, for other cases.

It is difficult at the present day to define with any precision what is necessary to make personal property, fixtures. The old rule which required annexation to the freehold, has been so often departed from as to furnish no rule at the present day. For the purposes of trade and as between landlord and tenant, that rule has been so modified as to authorize the removal of many articles which otherwise, by being so affixed, would have been included under the definition of fixtures.

Nor is the rule that any thing is a fixture which cannot be removed without injury to the freehold sufficiently extensive to give any correct definition of the articles coming within it.

The various cases of doves, rabbits, fish, blinds, keys, fences, hop-poles, deer, millstones, removed from their place by the owner, and others, are all exceptions to such a rule.

The more sensible rule seems to be one which of late years has been suggested by judges, viz: If the articles are essential to the use of the realty, have been applied exclusively to use in connection with it, are necessary for that purpose and without such, or similar articles, the realty would cease to be of value, then they may properly be considered as fixtures, and should pass with it.

I know that even this rule has been departed from in matters relating to trade, such for instance as the case of looms in a factory. (*Murdock v. Gifford*, 18 *N. Y. Rep.* 28.)

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But that case was decided upon the provisions of the statute, (2 R. S. 83, §§ 6, 7,) which provided that things annexed to the freehold for the purpose of trade or manufacture, and not fixed into the wall of the house, &c. should be deemed assets.

I am not prepared to say that I accede to the opinion delivered at the special term in this case that the rolling stock in all cases is to be considered as personal property, and does not pass under a mortgage of the road and its appurtenances. But it seems to me that there is another principle to be applied to this case which will render it not very material whether in a case where the conveyance is only of the realty, the rolling stock could be included.

It is found by the referee, and conceded, that the mortgage is sufficient to include in the mortgaged property the rolling stock; and it must also be conceded that such was the intent of the parties. Nor do I think there can be any doubt that the parties intended that the rolling stock and equipments of the road should pass as a part of the road and as necessary to its use. The object of the mortgage was to provide funds for the building of the road and preparing it for travel, and the intent of the parties was to secure the bondholders with the mortgage on the whole property in the road as used by them for travel. For this purpose the rolling stock was as necessary as the rails. Either could be supplied with more money, and without either the road could not be made available; and the fair inference is that the parties in giving this mortgage intended to include all, under its provisions. Where such was the intent of the parties, the court should give effect to it. If they had expressly declared that the rolling stock should be considered as fixtures attached to the road and to pass with the grant of the road, such an agreement would be valid, and the court would treat it accordingly. Such an intent may, I think, be fairly inferred from the terms of this mortgage.

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In *Murdock v. Gifford*, (18 N. Y. Rep. 28,) Johnson, Ch. J. says: "Between the parties, and between grantor and grantee, the effort of a court is always to ascertain the intent of the parties and to give it effect. If their language affords evidence that a chattel is intended to pass, it will pass, of course, whether it be a mere chattel or one which by annexation has become part of the realty.

In this case there seems sufficient to warrant the conclusion that the parties intended to include the equipments of the road as part of the realty, and that such a construction should be given to it by the courts. (*See also, Coe, trustee, v. Pennock et al.* 6 Law Reg. 27.)

The second question is as to the necessity of filing the mortgage as a chattel mortgage, if it should be held that the rolling stock did not pass with the road.

The authority granted by the 28th section of the general railroad act, (*Laws of 1850, p. 211*), authorizes railroad corporations to borrow money for the building of their roads or operating them, and to mortgage all their corporate property and franchise to secure the payment thereof. I think this section contemplates a mortgage of all the property, whether land, road, rolling stock or franchise, and warrants the conclusion that it was the intent of the legislature that the whole should be included in one mortgage and treated as a mortgage of the road and its accessories. Such a mortgage need not be treated as a chattel mortgage, and filed, to give it validity.

GEO. G. BARNARD, P. J. concurred.

SUTHERLAND, J. I concur in the conclusion that it was not necessary to file the mortgage as a chattel mortgage, but I remain of the opinion that the rolling stock of a railroad cannot be regarded as a fixture.

Judgment affirmed.

[NEW YORK GENERAL TERM, January 6, 1868. *Geo. G. Barnard, Ingraham and Sutherland, Justices.*]

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It is indispensable to the admission in evidence of a memorandum made by a witness at the time of the making of an alleged agreement, that it be shown the witness has no recollection of the matters stated therein, independent of the written paper. If he has such recollection, the evidence is inadmissible. Where a witness testifies fully to an interview between the parties, at which an agreement was entered into, a memorandum of the terms of such agreement, made by him at the time, is not admissible to corroborate the witness. A party to an action should not be permitted to give in evidence a memorandum made by *himself*, to prove the terms of a contract between him and his adversary, which has been made by him privately, and never shown to the other party. Such a rule of evidence would open a door to frauds of the worst character. *Per* INGRAHAM, J.

THIS action was brought to recover for services rendered. The parties differed as to the amount of compensation agreed on. The parties were examined as witnesses in their own behalf. The defendant was the only witness on his own part. He testified to an interview between him and the plaintiff, at which an agreement was made with the plaintiff as to the terms on which he would do the defendant's work. A written memorandum was then offered in evidence, made by the defendant of his agreement with the plaintiff, to corroborate the defendant's testimony. This was objected to by the plaintiff, but was admitted, and the plaintiff excepted. The referee rendered a judgment for the defendant.

*Chas. H. Mundy*, for the plaintiff.

*Ira D. Warren*, for the defendant.

*By the Court*, INGRAHAM, J. The only question is as to the admissibility of this memorandum to corroborate the defendant's testimony. Without referring to the decisions previous to those made by the Court of Appeals on this question, the rule as to the admission of such a memorandum is easily ascertained from those cases.

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The first case was that of *Halsey v. Sinsbaugh*, (15 N. Y. Rep. 485,) in which the attempt was made to prove what a witness had sworn to on a former trial. An attorney was called who had taken notes of the testimony and who stated that he had no doubt they were correct. The witness said he had no recollection of the testimony, independent of his minutes, and the judge excluded the evidence. Evidence of the testimony of a witness given on a former trial, can in most cases only be proved by the *recorded* testimony, and is not in any way to be compared to a memorandum of a transaction made by a witness after it has taken place. It is *sui generis*, and is recorded at the time of the transaction. No party or attorney can be supposed to remember all the testimony given in a cause, and the record made of such testimony at the time, furnishes the best and only proof which can be given of such testimony. As was said by Selden, J. in that case: "The efforts of memory are seldom equal to the task of recalling after any considerable lapse of time, even the exact substance of words and phrases, while it would be easy at the time to make an accurate record of their import." In that case the court held the evidence admissible.

In the next case, of *Russell v. Hudson River R. R. Co.*, (17 N. Y. Rep. 134,) a physician was examined as to the character of injuries sustained by the plaintiff, and the nature of the services rendered to him, and testified in regard thereto. A written memorandum or certificate of those matters, made by the witness at the close of his attendance on the plaintiff, was offered in evidence by the plaintiff and was received in evidence. This presented the reverse of the proposition held in *Halsey v. Sinsbaugh*, with the fact, that before examining the memorandum the witness had testified to all the matters contained therein.

Selden, J. also delivered the opinion of the court in the latter case. He says: "It is, however, an indispensable preliminary to the introduction of such a memorandum in

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evidence that it should appear, as it did in *Halsey v. Sinsebaugh*, that the witness is unable with the aid of the memorandum to speak from memory as to the facts. It is the duty of the court in all such cases to see, before receiving the memorandum in evidence, that it was made at or about the time of the transaction to which it relates; that its accuracy is duly certified by the oath of the witness, and that there is a necessity for its introduction on account of the inability of the witness to recollect the facts." It was held that the paper was improperly admitted, because the witness had a recollection of the facts independent of the memorandum, and a new trial was ordered.

This case was followed by *Guy v. Mead*, (22 N. Y. Rep. 462,) in which it was material to show at what time a calculation of interest was made. A witness testified he had made a memorandum in calculating interest on the day, but had no recollection of the time when it was made, independent of the paper writing. The memorandum was excluded. Denio, J. says: "That aside from the written paper the witness had no recollection as to the time when it was made, and the court held that the memorandum should have been received in evidence."

These cases are all perfectly consistent in requiring, as indispensable to the admission of such testimony, proof that the witness who made the memorandum has no recollection of the matters stated therein, independent of the written paper. When he has such recollection, the evidence is inadmissible.

The application of these rules to the case under examination shows that the evidence was improperly received. The defendant had been examined and had testified fully to the interview between himself and the plaintiff at the time of the contract between them. The paper was not offered because the facts could not be proven otherwise, but to corroborate the party testifying. For such a purpose it was not admissible.

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There is another consideration which does not enter into any of the cases cited, but which seems to me should have weight on such a question; and that is, the impolicy of permitting a party to an action to give in evidence a memorandum made by himself to prove the terms of a contract between him and his adversary, which has been made by him privately and never shown to the other party. If such a rule of evidence should ever be adopted, it would open a door to frauds of the worst character, and leave the proof of contracts not to the evidence of parties who make them and witnesses present, but to memoranda which they might make afterwards, containing their understanding, and not the terms of the contract.

It is possible that without this memorandum the referee might have found the same conclusions; but it is by no means clear that he would have done so. The evidence of the parties was contradictory, and a finding either way might have been sustained. Under such a state of facts we cannot say the evidence erroneously admitted had no influence on the referee.

The judgment should be reversed and the case sent back to the referee for a new trial, costs to abide the event.

[NEW YORK GENERAL TERM, January 6, 1868. *Geo. G. Barnard, Sutherland and Ingraham*, Justices.]



**JAMES BELGER vs. WILLIAM B. DINSMORE, President of  
the Adams Express Company.**

A receipt, such as is usually given by express companies for goods delivered to them for transportation, is not subject to any stamp duty, but is covered by the exception in the act of congress of 1865.

An express company is to be regarded as a common carrier, and its responsibility for the safe delivery of property entrusted to it, is the same as that of a carrier. It cannot by a notice, or by an exception in a receipt, which is not shown to have come to the knowledge of the shipper or holder, exempt itself from liability in whole or in part, if goods are lost through its negligence.

Nor will proof, even, that such notice was brought to the knowledge of the owner, be sufficient to relieve the carrier's liability; but an express contract must be proven.

In an action against an express company, to recover the value of a trunk and its contents, which it had undertaken to transport, which were lost while in its care, the defendant gave in evidence a receipt, given at the time of receiving the trunk, in which the liability of the company was limited to the sum of \$50. There was no evidence, on the trial, that knowledge of the contents of the receipt ever came to or was brought home to the plaintiff. The justice not only refused to submit to the jury the question whether there was any evidence of a contract between the parties, but held that the receipt was a binding contract between the parties and limited the defendant's liability to \$50 and interest, and directed a verdict for the plaintiff for that amount. *Held* that in this the justice erred.

**T**HE plaintiff sues the defendant to recover the value of a trunk placed in charge of the express company, and lost while under their care. The loss was not disputed on the trial. The plaintiff valued the trunk and contents at \$467.

The defendant offered in evidence a receipt, given at the time of receiving the trunk, on which was a stipulation on the part of the company, limiting their liability in various ways. The only fact material in this controversy is as follows: "Nor in any event shall the holder hereof demand beyond the sum of fifty dollars, at which the article forwarded is hereby valued, unless otherwise herein expressed, or unless specially insured by them and so specified.

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in this receipt, which insurance shall constitute the limit of the liability of the Adams Express Company."

The articles included in this receipt were six trunks and three boxes. One of the trunks was lost.

Upon the trial, the admission of the receipt in evidence, when offered by the defendant, was objected to on the ground that it was not stamped, which objection was overruled and the plaintiff excepted. The court then permitted the defendants' counsel to affix a stamp, in court.

The admission of the receipt in evidence was also objected to on the ground that there was no evidence that knowledge of the contents of the receipt ever came to or was brought home to the plaintiff; which objection was overruled, and the counsel for the plaintiff excepted.

The plaintiff asked to submit the question of negligence to the jury, which the court refused, and held that the receipt was a contract between the parties, and the defendant was excused from all liability except as stated in the receipt; and the judge so charged the jury, and directed them to find a verdict for the plaintiff for \$50 and interest; to which the plaintiff excepted. The jury so found. The court ordered the exceptions to be heard at the general term in the first instance, and judgment was suspended.

*David P. Hall*, for the plaintiff. I. The Adams Express Company are governed by the rules of law applicable to common carriers, in their character of express agents, forwarders, and bailees for hire. (*Sweet v. Barney*, 23 N. Y. Rep. 335.) In this case the Court of Appeals held "that the defendants (an express company) were common carriers," and said, "persons whose business it is to receive packages of bullion, coin, bank notes, commercial paper, and such other articles of value as parties see fit to entrust to their care, for the purpose of transporting the same from one place to another for a compensation, are common carriers, and responsible as such, for the safe delivery

of property entrusted to them." The Supreme Court of Massachusetts has just decided in the same way in the case of *Buckland & Co. v. Adams Express Co.*) "In this country, in recent times, the business of carrying goods is almost monopolized by what are called expressmen." "These are undoubtedly common carriers." (*Parsons' Mercantile Law*, 202.) "The general principles of agency extend to common carriers, and make them liable for the acts of their agents done while in the discharge of the agency or employment." (*Id.* 216.)

II. The plaintiff made out his case upon the trial as to the bailment of the property in question to the defendant, without alleging any written contract, and the defendant, by resting the defense upon a *receipt*, having written upon it a notice limiting his liability in case of loss, which he offered in evidence in proof of the contract between the plaintiff and himself, *elected to subject himself* to the application of the strict rule of law in reference to contracts, and the question whether or not that notice was brought home to the plaintiff, and whether, if so, it was assented to by him, were questions of fact, which should have been left to the jury to determine upon all the evidence, under the direction of the court. No party will be affected by any notice unless a knowledge of it can be brought home to him. "The question is one of fact, which the jury will determine upon all the evidence, under the direction of the court." (*Parsons' Mercantile Law*, 223. *Dorr v. New Jersey Steam Navigation Co.*, 11 N. Y. *Rep.* 485.)

The justice, at the trial, erred, therefore, in holding "that the taking of the receipt by the plaintiff's wife, when she delivered the trunk to the express agent, was evidence that she then knew its contents." And in holding "that said receipt was itself a contract between the plaintiff and the defendant, and that the fact of its acceptance by the plaintiff as shipper of the goods in question at the time of the shipment of said goods, was sufficient evidence

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of notice to the plaintiff of its contents being brought home to the knowledge of the plaintiff, or his attention being directed to it, and that the fact of such knowledge must be presumed from the receipt being accepted." The case of *Brown v. Eastern Railroad Co.*, (11 Cush. 97,) was an action of assumpsit for lost baggage. There was a notice printed on the back of the passage ticket given to the plaintiff, that the defendants would not be responsible beyond a specified sum; but no other notice was given, nor was the plaintiff's attention called to this. Held, that these facts did not furnish that certain notice which must be given to exonerate the carrier from his liability. The same doctrine has very recently been held in the Supreme Court, circuit, of Kings county, by his honor Judge GILBERT, in the case of *Williams v. Dodd*, but in that case, the receipt was put in evidence by the plaintiff, and not by the defendant. In the case of *The Camden and Amboy R. R. Co. v. Baldauf*, (16 Penn. Rep. 67,) it was held incumbent on the carrier to prove, that the passenger had actual knowledge of the limitation in the notice. The justice erred further in his ruling, quoted above, inasmuch as his decision prevented the plaintiff from adducing testimony upon the point as to whether or not the notice was assented to by him, and in confounding the act of taking the receipt with the notice printed upon it, with that acceptance which would imply assent to its terms. "A common carrier cannot screen himself from liability by notice, whether brought home to the owner or not. Notice is no evidence of assent on the part of the owner, and he has a right to repose on the common law liability of the carrier, who cannot relieve himself from such liability by any act of his own." (19 Wend. 234. *Dorr v. New Jersey Steam Navigation Co.*, 11 N. Y. Rep. 485. *Parsons' Mercantile Law*, 223.)

III. But, even if the receipt and notice constituted a contract binding upon the parties, the defendant is still liable for negligence and carelessness, if these can be

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proved or lawfully inferred. The justice erred, therefore, again, in refusing leave to the plaintiff to introduce proof on the point of negligence, and in refusing leave to go to the jury on this point, and in holding "that the receipt was to all intents and purposes a contract between the parties, and that the defendant was by it excused from all liability except as stated in the receipt." (*Parsons' Mer. Law*, 224. *Dorr v. N. J. Steam Nav. Co.*, 11 *N. Y. Rep.* 485.) In the present case, the failure of the defendant to account for the loss of the property in question by accident, or in any way, gives rise to the just inference that the loss was caused by the gross negligence and default of the defendant and its agents, in the premises.

*C. A. Seward*, for the defendant. I. A common carrier may limit his liability. Upon this point, as positive precedent supplies the authority, argument *a priori* is unnecessary. (*York Company v. Central Railroad*, 3 *Wallace U. S.* 111. *Parsons v. Monteath*, 13 *Barb.* 353. *Moore v. Evans*, 14 *id.* 524. *Dorr v. N. J. Steam Navigation Co.*, 1 *Kern.* 485. *Lee Marsh*, 43 *Barb.* 102.) In this last case, LEONARD, P. J. said: "I think it must be considered as settled, in this state, that common carriers may limit their liability for negligence, in almost any respect, by express contract," and, "that such contracts are not against public policy." This was concurred in by SUTHERLAND and BARNARD, JJ.

II. The receipt given in evidence constituted a contract between the parties. It is called, in the receipt itself, an "agreement," and a "contract." It was so construed at *nisi prius*. It specifies the terms upon which the carriage was undertaken, and in so doing extends beyond the simple acknowledgement of the delivery of the subject of transportation. The receipt was a bill of lading.

III. The limitation of value to \$50, unless otherwise expressed in the agreement itself, was valid. 1. The reward of the carrier is predicated on the value of the thing

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carried. Such apportionment is reasonable, because the value is the prime element of risk, and the law allows compensation proportioned to risk. 2. This stipulation limits the common law liability of the carrier as insurer, and is as reasonable as an agreement in a policy to abridge the statutory period of limitation. Such agreements are valid. (*Cray v. The Hartford Fire Ins. Co.*, 1 *Blatch.* 280. *Reilly v. the Aetna Ins. Co.*, 30 *N. Y. Rep.* 136. *Roach v. N. Y. and Erie Ins. Co.*, *Id.* 546.) 3. This very stipulation, and others, differing in amount only, have been frequently the subject of judicial sanction. (*Van Toll v. The S. E. Railway Co.*, 12 *C. B. N. S.* 75, 104, *Eng. Com. Law.* *Newstadt v. Adams*, 5 *Duer*, 43. *Van Winkle v. Adams Express Co.*, *MS.* *Gagnebin v. The American Express Co.*, *MS.* *Nash, referee.* *Parker v. Dinsmore*, *MS.* *Cowles, referee.* *Meyer v. Harnden Express*, 24 *How. Pr.* 290. *Meyer v. Harnden Express Co.*, 1 *Daly*, 227. *Boorman v. American Express Co.*, *MS. Sup. Court of Wisconsin.*)

IV. In the present case the insurance and acceptance of the receipt constituted a valid agreement, effectually limiting the liability of the defendant to \$50 in case of loss. 1. As to the defendant, the consignor and consignee were identical. The goods were delivered by her and were addressed to her. In the absence of knowledge, the legal presumption is in favor of the ownership of the consignee. (*Sweet v. Barney*, 23 *N. Y. Rep.* 335.) But where, as here, consignor and consignee are one and the same, the carrier has, at least, a right to suppose that the consignor is competent to contract as to the terms of carriage. Such, indeed, would be the rule if the consignee were another person. (*Moriarty v. Harnden Express*, 1 *Daly*, 227.) 2. All bills of lading are unilateral, and yet are universally held to conclude the shipper. A promissory note, when paid by its maker, belongs to him, and equity will compel its restoration, though the holder never entered into any agreement to return it. The sender of a telegram is con-

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cluded by the conditions contained in the printed blanks for messages, furnished by the telegraph company. (*Breese v. U. S. Tel. Co.*, 45 Barb. 274. *MacAndrew v. The Electric Tel. Co.*, 17 Com. B. 384, E. C. L.) The conditions of a policy are binding upon the assured, though not signed by him. In fine, the majority of human contracts are unilateral, and repose for their obligation upon the assent which the law implies from their acceptance. 3. The plaintiff stipulated that the receipt was issued to him, and received by him, as shipper, and he produced it on the trial. This implies both knowledge and assent. In this country the legal presumption is in favor of education and of an ability to read. If the reception and retention of an unpaid account without objection, is sufficient to enable the creditor to recover upon an *insimul computassent*, or a stated account, (12 Wend. 413; 1 Kern. 172; 12 Pet. 830; 45 Barb. 490,) *a fortiori viz dubitari posse videtur*, that the reception and retention of a bill of lading will conclude the educated shipper, unless he proves his dissent. The burden is upon him to show ignorance or dissent. In *King v. Woodbridge*, (34 Vermont Rep. 571,) it was said that "a paper being shown to be in the custody of the plaintiff, a due and proper delivery of it to him, and of his assent to its terms are to be presumed, and the burden is thrown on the plaintiff to obviate these presumptions, by proof. It is for the plaintiff to show the circumstances under which the paper came into his possession; that he never assented to its terms, and that there was no such delivery of it, as to make it operative as a binding contract." This was cited and enforced by the Supreme Court of Wisconsin in the case before referred to. But, upon authority, this whole question is beyond argument. In *Van Toll v. The S. E. Railway Co.* (*supra*,) the stipulation was that "the company will not be responsible for any package exceeding the value of £10." There was no proof that the plaintiff had read the ticket. She had a verdict for £20. The

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court of common pleas unanimously set it aside, holding that acceptance of the ticket was assent to the terms thereon printed. In *Dorr v. The N. J. Steam Nav. Co.*, (*supra*.) the receipt contained the following clause: "No package whatever, if lost, injured, or stolen, to be deemed of greater value than two hundred dollars." The plaintiffs proved that such receipt did not come to their knowledge, otherwise than by delivery to their carman, until the day after the goods were shipped. The court refused to charge that the liability of the defendants for a total loss by fire was limited to \$200. The Court of Appeals said: "The exceptions to the common law liability being made in the bill of lading, and delivered to the agent of the plaintiffs, must be deemed to have been agreed upon by the parties." This decides, 1. That acceptance is assent. 2. That a receipt is a bill of lading. The railway ticket cases, in the same court, further illustrate the rule. (24 *N. Y. Rep.* 182. *Id.* 215, 223. 25 *id.* 445.) In *The York Co. v. The Central Railroad*, (*supra*.) the judge charged the jury, that "it is competent for the carrier alone to limit his liability without the engagement of the owner." 4. It follows from these views that the plaintiff's objections to the legal character of the receipt, and his offers of evidence to contradict its legal effect, were properly disposed of at the circuit.

V. The receipt did not require an internal revenue stamp. It was expressly exempted therefrom. It was an economy of time and labor to affix it, and obviated any necessity for an argument or citations of various statutes, not then in court. If it did not require a stamp, the affixing one was inutile and harmless. If it did require a stamp, as insisted by the plaintiff, then the same law which rendered the stamp necessary, authorized it to be affixed in court. The receipt was dated "May 4, 1864." The 163d section of the act of June 30, 1864, (13 *U. S. Stat. at Large*, 295,) authorized the affixing of the necessary stamps, either in



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court or out of court. *Omne majus, &c.* The power to require a stamp implies the power to prescribe the time when the stamp must be affixed; and the force of the plaintiff's objections to the defendant's affixing it is not perceived.

*By the Court, INGRAHAM, J.* Two questions are submitted to us on this case: 1st. Whether a receipt by an express company requires a stamp; and, 2d. Whether such a receipt, which limits the liability of the express company, is a contract between the parties, protecting the company from liability, except as stated therein, without any proof of knowledge on the part of the holder, of the contents thereof.

*First.* The objection to the admission of the receipt without a stamp has been examined by the general term of this district, in the case of *DeBarre v. The Hope Express Co.*, (48 Barb. 511.) It was there held that the stamp was not required, and that the exception in the act of 1865, covered such a receipt.

*Second.* The principal question in the case is as to the extent of the defendant's liability, and whether an express company can by a notice, or by an exception in a receipt, which is not shown to have come to the knowledge of the shipper or holder, exempt themselves from liability in whole or in part, if the article is lost through the negligence of the express company.

That the defendant's company is to be regarded as a common carrier, and their responsibility for the safe delivery of property intrusted to them is the same, has been settled by various decisions. (*Russell v. Livingston*, 19 Barb. 346. *Sherman v. Wells*, 28 id. 403.) And the same has been distinctly held by the Court of Appeals, in *Sweet v. Barney*, (23 N. Y. Rep. 335.)

It is equally well settled that a common carrier may by express contract between himself and the party contract-

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ing with him, agree to a limitation of his liability. (*Parsons v. Monteath*, 13 Barb. 353. *Moore v. Evans*, 14 id. 524. *Dorr v. N. J. Steam Navigation Co.*, 11 N. Y. Rep. 485.) In the latter case it is said: "That a carrier may by express contract restrict his common law liability is now, I think, a well established rule of law." (*Lee v. Marsh*, 43 Barb. 102. *York Co. v. Central R. R. Co.*, 3 Wallace U. S. Rep. 111.)

The decisions in this state also have settled that a common carrier cannot relieve himself from liability either in whole or in part by a mere notice indorsed upon the ticket or receipt. (*Hollister v. Newton*, 19 Wend. 234,) in which it was held that the carrier's notice, even if brought home to his employer, could not be sufficient to infer an express contract. The argument there used is that the carrier is bound to receive and carry goods delivered to him, for which duty he receives a compensation. He has no right to prescribe other terms, and a notice, at most, is only a proposal for a special contract, which requires the assent of the other party.

So in *Bissell v. N. Y. Central R. R. Co.*, (25 N. Y. Rep. 442,) Selden, J. says: "The position appears to be settled, that the companies cannot limit their responsibility by any notice, though expressly brought to the knowledge of those whose persons or whose property they carry, but they may secure such limitation by express contract with those persons."

These cases all rest on the principle that the carrier receives a consideration for the carriage, and he is bound to carry the goods accordingly; that he cannot by a mere notice relieve himself from that liability; that even proof of its being brought to the knowledge of the owner would not be sufficient to relieve the carrier's liability, but that an express contract must be proven.

There is another class of cases where the carriage of passengers on free tickets, without compensation, does not

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involve the application of this strict rule; but that rests on a different principle, and is not applicable to the present case.

Upon the trial of this case, the justice not only refused to submit to the jury the question whether there was any evidence of a contract between the parties, but expressly held that the contents of the receipt were a binding contract between the parties, and limited the defendant's liability to \$50 and interest, and directed a verdict for the plaintiff for that amount.

In this the learned justice erred, and a new trial must be ordered.

Verdict set aside and a new trial ordered; costs to abide the event.

[NEW YORK GENERAL TERM, JANUARY 6, 1868. *Geo. G. Barnard, Sutherland and Ingraham, Justices.*]

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 DOUGLASS vs. WOODWORTH and others.

A subsequent party in interest, whether by way of mortgage, lease or judgment, cannot on a motion obtain a right to redeem and have the property conveyed to him by a purchaser. The only remedy in such a case is by action seeking to enforce such right to redeem; and in such an action the rights of all other parties can be protected.

Where such a motion is made in a foreclosure suit, after the property has been sold and the deed delivered, by lessees for a term of years, alleging that they were misled by erroneous information, all that can be done is to open the judgment, set aside the sale and the conveyance, allow the lessees to put in an answer, and order a resale of the property.

This can only be done on terms of indemnifying the purchaser, repaying to him the money paid by him on the purchase, and all expenses incidental thereto. The purchaser, in such a case, should have the election of permitting the resale, or of ratifying the lease to the applicants; and if he elects to do the latter, the sale should not be disturbed.

*It seems*, the proper remedy of the lessees is to claim the value of their lease out of the surplus, rather than by motion to redeem.

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**M**OTION by lessees to redeem, in a foreclosure suit.

*By the Court*, INGRAHAM, J. It seems to me very clear that a subsequent party in interest, whether by way of mortgage, lease or judgment, cannot, on a motion, obtain a right to redeem and have the property conveyed to him by a purchaser. The only remedy in such a case is by action seeking to enforce such right to redeem; and in such an action the rights of all other parties can be protected.

This action is to foreclose a mortgage; the parties making the motion are lessees for a term of years; their ground of complaint is that they have been misled by some information received from the counsel, and after waiting till the property was sold and the deed delivered, they make this motion.

All that could be done on such a motion is to open the judgment, set aside the sale and the conveyance, allow the defendants Crump and Lynch to put in an answer and order a resale of the property. This can only be done on terms of indemnifying the purchaser, by repaying to him the money paid by him on the purchase and all expenses incidental thereto.

So far as Brush is interested, he appears to be a *bona fide* purchaser, and his interest ought not to be divested and the estate restored to Jacobs as is proposed by this order. Jacobs has made no application, and the sole object of this motion is to protect Crump and Lynch in the enjoyment of their lease. Brush should therefore have the election of permitting the resale or of ratifying the lease to Crump; and if he elects to do the latter, the sale should not be disturbed. It is a matter of no moment to Crump and Lynch, whether the sale was for an inadequate price or not, if their lease is confirmed; and even if it is not, I rather think their remedy is by claiming the value of their lease out of the surplus, rather than the course

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which was adopted below. There is no possible ground for directing the purchaser to give the benefit of his purchase to Crump and Lynch, merely because they held a lease of the premises.

If such a rule can be established on a lease for six years, it may be done on a lease for one year, and the value of a sale of property under a foreclosure will be sensibly diminished.

The order appealed from should be reversed, and an order made setting aside the judgment and sale and deed given thereon, and directing a resale of the premises by the referee, with leave to the defendants Crump and Lynch, to file and serve an answer setting up their claim as lessees; such answer to be filed *nunc pro tunc* as of the time when the same was due. That said Crump and Lynch must pay to the purchaser all expenses paid by him in examining title and recording deeds, &c.; to compensate him for his trouble; that on the resale the moneys shall be retained by the referee, and out of the purchase money he shall pay to Brush the whole amount of the purchase money paid by him on the purchase, with interest, less the amount of any rents he may have received (if any) since the sale.

Crump and Lynch should also be required to give the purchaser, Brush, a bond with sureties to secure to him the payment of the money on the resale. Upon these terms the defendants Crump and Lynch may be relieved.

If the purchaser, however, elect within ten days after notice of this order, to satisfy and confirm the lease of Crump and Lynch for the remainder of the term, and serve a notice on them within that time, and shall execute and deliver a ratification of such lease within thirty days, then the motion should be denied.

The costs of this appeal should in any event be paid by Crump and Lynch.

[NEW YORK GENERAL TERM, January 6, 1868. Geo. G. Barnard, Sutherland and Ingraham, Justices.]

**In the matter of the petition of JOHN W. LEWIS, to vacate  
assessment for regulating West street.**

The provisions of the act of April 17, 1858, (*Laws of 1858, ch. 388*), are only intended to relieve against fraud, or legal irregularity, in the proceedings relative to an assessment, or the proceedings to collect the same.

The act does not authorize any inquiry whether the work has been well done; or whether the contract has been fully performed; or whether the materials used are according to the specifications; or whether the common council had all the surveys and certificates of inspectors, as required by the ordinances.

These matters belonged to the common council, as the law was formerly, and now to the board of review; and do not come within the purview of this statute, except in cases where fraud is alleged to have been committed.

The common council of New York has power, under sections 175 and 176 of the act of 1818, (2 *R. L. p.* 407,) to assess the expense of repairing or repaving a street upon the property. The subsequent authority to the common council to repair the streets and employ persons therefor, in sections 198, 194 and 195, does not prevent the charging the expense thereof to the owner. Even if it did, it would not apply to a case of an entirely new pavement, after raising and altering the grade.

The question whether the ordinance of the corporation, passed in 1824, by which it was agreed that the streets should be kept in repair at the public expense, after they are once paved at the expense of the owners, prevents any such assessment, does not come within the provisions of the act of 1858.

If the corporation has not the power, the want of it is not an *irregularity* in the proceedings in making the assessment, nor in collecting it. If the common council have made a contract with the owner which they seek to violate, the remedy is not under the act of 1858.

The ordinance of 1824 applies only to streets paved after its passage.

The unanimous consent required to make an ordinance passed by both boards of the common council of New York, on the same day, valid, is the consent of all the members present at the time of its passage. If this appears from the fact that no objection was made at the time, and that all the members present voted for the ordinance, it is valid.

The provision of law that no contract for any public improvement shall be entered into, before an appropriation has been made therefor, (*Laws of 1857, ch. 446*), does not apply to cases where the expense is charged upon the owners, and not upon the public treasury.

Assessors should not include any charge for making an assessment for repaving a street. The allowance of two and a half per cent for making the assessment is no longer a legal charge.

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In the matter of Lewis.

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*By the Court, INGRAHAM, J.* An application was made to Judge CLERKE to vacate the assessment in this case, under the act of 1858. (*Laws of 1858, ch. 338.*) Testimony was taken before that justice, and afterwards, on a hearing before another justice, the application was denied. The petitioner appealed from that order.

The provisions of the act of 1858, in most of the applications under it for relief, are not properly understood. They are only intended to relieve against fraud, or legal irregularity in the proceedings relative to an assessment, or the proceedings to collect the same. Keeping in view the object of the statute, it is apparent that it does not authorize any inquiry whether the work has been well done; or whether the contract has been fully performed, or whether the materials used are according to the specifications; or whether the common council had all the surveys and certificates of inspectors, as required by the ordinances. These matters belong to the common council, as the law was formerly, and now to the board of review; and do not come within the purview of this statute, except in cases where fraud is alleged to have been committed.

This application is not founded on any allegations of fraud, but the petitioner asks relief for the supposed legal irregularities in the proceedings.

The first objection is, that the common council have no authority to assess for repaving a street. The power to assess the expense of paving a street is admitted to exist under sections 175 and 176 of act 1813, (*2 R. L. p. 407.*) The subsequent authority of the common council to repair the streets and employ persons therefor, in sections 193, 194 and 195, does not prevent the charging the expense thereof to the owner. Even if it did, it would not apply to this case of an entirely new pavement, after raising and altering the grade. Either repairing or repaving may be, under these sections, made a charge upon the property.

It is, however, urged that the ordinance of the corpora-

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In the matter of Lewis.

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tion passed in 1824, by which it was agreed that the streets should be kept in repair at the public expense after they are once paved at the expense of the owners, prevents any such assessment.

In *Rhineland v. The Mayor, &c.* (24 How. Pr. 304,) this question was raised, and the justice expressed the opinion that the common council could not bind themselves not to assess for such repaving.

That case has been, to some extent reversed so far as it held that the common council could not impose part of the expense of paving a street on the public, and I cannot assent to the doctrine that the common council may not provide by ordinance for repairing and repaving streets at the public expense.

I do not, however, consider it necessary to pass on that question here, because this does not come within the provisions of the act of 1858. It is not an irregularity in the proceedings in making the assessment nor in collecting it. If the common council have made a contract with the owner which they now seek to violate, the remedy is not under this act.

That ordinance also applies only to streets paved after its passage, and there is no evidence to show when West street was originally paved.

The objection to the ordinance of July 15, 1864, is not valid. It was passed by both boards, on the same day. That could not be done unless by unanimous consent. The unanimous consent required is the consent of all the members present at the time of its passage. This appears from the fact that no objection was made at the time, and that all the members present voted for the ordinance. Nor was it necessary to publish it for two days previous. That was necessary when the first ordinance was passed, but was not necessary for its amendment. The expense originated under the first ordinance, and a publication then gave notice to the owners, of the contemplated improvement, and thus satisfied that requirement of the statute.



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In the matter of Lewis.

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Another objection is that no appropriation was made by law before the contract was made. (*Laws of 1857, ch. 446.*) It is a sufficient answer to say that this provision does not apply to cases where the expense is charged upon the owners and not on the public treasury. The authority to advance to the contractor is under another statute, and the amount so advanced is refunded to the city when collected from the owners.

The other objections, to the mode of doing the work and the want of proof annexed to the assessment rolls, are not grounds for vacating this assessment. The stipulation shows the inspectors certificates were in the Croton aqueduct department.

The remaining objection is that the assessors named in the ordinance did not make the assessment. The assessors had been changed between the passage of the ordinance and the signing of the assessment roll.

The statute (*Sess. L. 1859, ch. 302*) directs the duty of assessing to be done by the board of assessors for the time being. The ordinance should have directed the assessment to be made by the board, and it was unnecessary to name them individually. The appointment appears to have been made by the board, and there is in this respect no irregularity, of which the petitioner can complain.

The assessors should not have included any charge for making the assessment. The allowance of two and a half per cent for making the assessment is no longer a legal charge. I have heretofore expressed this opinion, but as the amount was very small did not consider it advisable to vacate an assessment in all other respects valid.

The board should not include such a charge, and if persisted in, the court will feel bound to grant relief from it in cases which shall hereafter be brought before it.

The order appealed from is affirmed.

[NEW YORK GENERAL TERM, JANUARY 6, 1868. *Geo. G. Barnard, Sutherland and Ingraham, Justices.*]

## ALLEN vs. BROWN.

51 86  
81h 351  
51b 86  
151a 509

Where an agent, appointed to settle claims against a third party, receives from the debtor promissory notes for the amount, payable at future periods, which are perfectly good and in fact paid when due, and before maturity, sells the same for less than the face thereof, without consulting with or informing his principals, and without making any inquiries of parties with whom funds have been deposited for their payment, and on being called upon to account denies that he has received any thing on the notes, for which he is liable to account, such sale is a clear violation of his duty to his principals, and warrants a finding that the sale was without authority.

In such a case the principals can recover of the agent the excess of the amount of the notes over and above the sum actually paid to him, under a complaint containing allegations equivalent, in substance, to the count for money had and received, to the whole amount of the notes.

Under such circumstances, the agent is liable upon the ground that the notes which he took in satisfaction of the demand of his principals being good and collectable, and he having by his transactions released the debtor, and deprived his principals of all remedy except against himself, he is to be treated as having made himself answerable to them for the full amount he ought to have received from the debtor.

Although, in general, to support the action for money had and received, it is necessary to prove that the defendant actually received money or its equivalent, for the use of the plaintiff, yet where property is received as money the action will lie, the same as if money had been received.

An assignment, by the creditors, transferring, in terms, to the assignee, all the right, title and interest of the assignors, and each of them, to the notes and the avails thereof, and the moneys received by their agent upon the settling and arranging of the claims against the debtor, passes their right of action against the agent, for money had and received, to the full amount of the notes.

Where such assignment is absolute, and valid on its face, and transfers to the assignee a perfect legal title, his right to maintain an action is not affected by the fact that nothing was paid for the assignment; nor by the circumstance that one of the assignors agreed to take care of the case and to save the assignee from costs if he was unsuccessful.

The fact that the principals were joint owners of the original claims against the debtor will not prevent either of them from maintaining an action to recover his share of the money collected thereon by their agent.

**A** PPEAL from a judgment entered on the report of a referee. The following facts were found by the referee:

1st. That in the spring of 1858, and prior thereto, Constant Cook, Jotham Clark, Trumbull Carey, and the defendant were owners of certain claims against the Madison and Indianapolis Railroad Company, a corporation organized under and in pursuance of the laws of the state of Indiana, amounting to over \$2300, in which said claims, the said Cook, Clark, Carey and the defendant, were in all respects equally interested.

2d. That the said Cook, Clark and Carey, in or previous to the spring season of the year 1858, respectively authorized the defendant, who had an equal fourth interest in the said claim, to take charge of said claim, and in their behalf, collect, settle or arrange the same.

3d. That said defendant did, in pursuance of the authority thus conferred upon him by the said Cook, Clark and Carey, proceed to the state of Indiana, and did, on or about the 17th day of December, 1859, settle and arrange said claim, with said company, as well in his own behalf as in behalf of said Cook, Clark and Carey, and in full settlement thereof, did receive from said company, thirty-six income bonds of one thousand dollars each, at eighty cents on the dollar, or at twenty per cent discount; and three notes of said company, dated respectively on the first day of October, 1859, two of which were given for the sum of fourteen hundred and four dollars and sixty cents each; one of which was made payable in two years, and the other in three years from their dates, without interest; that the other of said three notes was made for the sum of \$491.61, payable in eighteen months after date, without interest.

4th. That the income bonds received by the defendant in the said settlement and arrangement of said indebtedness were divided between the said Cook, Clark, Carey and the defendant, in a way satisfactory to them respectively.

5th. That in June, 1861, and after the settlement and arrangement of the said demand, the said Jotham Clark,

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one of the owners of said claim, called upon the defendant for his portion of the avails of the said claim, as settled and arranged by the defendant; that the defendant claimed compensation for his services, before delivering over what he had received, and promised to make a statement of the items of his claim for services and expenses, but failed to do so, until in the month of March, 1863, when upon a demand made by Cook, Carey and Clark, for their respective shares of said notes given by said company, then, and not before, he rendered a specific account of his charges for his services, expenses and disbursements.

6th. That the notes given by said company were good security for the payment of their respective amounts, and were paid as they respectively became due, except the note for \$491.61, which was paid to the defendant early in June, 1861.

7th. That in the month of October, 1861, the defendant, without authority from said Cook, Carey or Clark, or either of them, sold said note for \$1404.60, payable in two years for \$500, and afterwards, and shortly prior to the time when the note for \$1404.60, payable in three years became due, without authority from Cook, Carey or Clark, sold the same for \$1260.

8th. That the whole value of the defendant's services rendered, and his expenses and disbursements paid in making such settlement and arrangement, amounted on the 24th day of August, 1861, to the sum of \$600; that the costs and expenses subsequently paid by him in said business with said company, in his efforts to collect for himself and the said Cook, Cary and Clark, the coupons on said income bonds, which fell due in April and October, 1860, a liability to pay which had been incurred by him prior to the 24th day of August, 1861, including the value of his services in adjusting and paying the same, amounting on the 24th day of December, 1861, to the sum of \$375,

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which in the opinion of the referee was a full and ample compensation for all the services rendered, and expenses incurred, and disbursements paid by him in and about said business, up to and including the charge in his account of the 24th of December, 1861.

9th. That on the 13th day of May, 1863, the said Cook, Clark and Carey made an assignment in writing, and delivered the same to the plaintiff, by which they jointly and severally assigned to him, all and each of their joint or several rights, title and interest, in and to said notes and coupons detached from said bonds, or either of them, and to the money, notes, coupons, vouchers, or other vouchers or securities received by said defendant upon selling and arranging said claims, as fully as they or either of them owned the same; for this assignment, although it appears to have been made for value received, nothing was in fact, paid by the plaintiff to the assignors.

The referee's conclusions of law from the foregoing facts were as follows, viz :

1st. That the plaintiff, by the assignment, succeeded to all the rights of the assignors and had the right to maintain this action, and was entitled to the same recovery against the defendant, as the assignors would have been, had no assignment been made, and the action brought in their names.

2d. That the defendant, without authority from the said Cook, Clark or Carey, sold and disposed of said two notes of \$1404.60 each, and was, therefore, inasmuch as the said notes were good and collectable, bound to account to the plaintiff for three fourths of the same, and interest secured to be paid thereby, and that he was also bound to account to the plaintiff for three fourths of the sum of \$491.61, and interest from its maturity, (eighteen months from date.)

3d. That the defendant was entitled to have deducted, as of the 24th of August, 1861, three fourths of the value

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of the services rendered, and expenses paid by him up to that date, in settling and arranging said claim, &c. and three fourths of the further sum of \$375, as of the 24th of December, 1861, principally paid for costs in his efforts to collect said coupons.

4th. That the plaintiff was entitled to recover in this action against the defendant therein the sum of \$2006.64, for which, besides the costs in this action to be adjusted, he was entitled to judgment.

Judgment being entered accordingly, the defendant appealed.

*John C. Strong*, for the appellant.

*D. Rumsey*, for the respondent.

*By the Court*, JAMES C. SMITH, J. The main question in this case is whether the defendant is liable for the excess of the amount due on the two notes sold by him, over and above the sum which he received therefor. The referee has deduced such liability as a legal conclusion, from the facts found by him, that the notes referred to were sold by the defendant without authority from the plaintiff's assignors, and that they were good security for their respective amounts. If the findings are warranted by the evidence, the conclusion is correct.

The defendant insists that the finding of the referee that the sale of the notes was without authority, is not warranted by the evidence. It appears from the testimony that the notes were executed by the president of the Madison and Indianapolis Railroad Company, dated the 1st of October, 1850, for \$1404.60, each, and were payable at the office of Winslow, Lanier & Co. in the city of New York, one in two years, and the other in three years from their date. They were delivered to the defendant in settlement of certain claims against the company, held by

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the defendant and the plaintiff's assignors, and in the settlement of which the defendant acted in his own behalf and also as the authorized agent of the other claimants. In September, 1861, the defendant sold the note which was to mature on the first of the next month, to a dealer in railroad securities in the city of New York, for \$500, and in February, 1862, he sold the other note to the president of the company for \$1260. The railroad company deposited funds with Winslow, Lanier & Co. for the payment of the notes, and they were in fact paid at maturity. When the defendant took the notes he was told by the president that they would undoubtedly be paid, and while he held them the notes of the company were esteemed good in Indiana. The defendant sold them without consulting with, or informing the plaintiff's assignors, and without making any inquiry of Winslow, Lanier & Co. The defendant was frequently called on by the plaintiff's assignors to account to them for the notes, but he uniformly denied that he had received any thing on them for which he was liable to account. Under these circumstances, the sale of the notes by the agent, at a sacrifice, without consulting his principals, was a clear violation of his duty to them, and the referee was fully warranted in finding that the sale was made without authority.

The defendant next argues that by reason of the form of the complaint, he is not liable for the excess of the amount of the notes over and above the sum actually paid to him. The complaint contains allegations which are equivalent in substance to the count for money had and received to the whole amount of the notes. It is true that, in general, to support the action for money had and received, it is necessary to prove that the defendant actually received money or its equivalent, for the use of the plaintiff. But the rule is not without exceptions. Thus, it is well settled, that where property is received as money, the action will lie, the same as if money itself had been re-

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ceived. (7 Cowen, 622.) In the present case, the defendant is liable upon the ground that the notes which he took in satisfaction of the demand of his principals being good and collectable, and he having, by his transactions, released the debtor, and deprived his principals of all remedy except against himself, he is to be treated as having made himself answerable to them for the full amount he ought to have received from the railroad company. In *Jackson v. Baker*, (6 Cowen, 183, note,) it was held by the United States Circuit Court, in the district of Pennsylvania, that an action for money had and received will lie by a principal against his factor who sells his goods, and for the amount takes a bond to himself, including a debt of his own, and this though nothing is received. On motion for a new trial the ruling was affirmed upon the ground that by the conduct of the defendant in extinguishing the original debt, and destroying all privity between the plaintiff and the person to whom the goods were sold, he must be considered as a receiver of that debt to the use of the plaintiff, as much as if he had released the debt. The reasoning of the court in that case is applicable to the case at bar. The case of *Floyd v. Day*, (3 Mass. R. 403,) which is cited with approbation in *Beardsley v. Root*, (11 John. 464,) proceeds upon a similar ground, as appears by the statement contained in the opinion of Van Ness, J. in the contract referred to. To the same effect is the case *Denton v. Livingston*, (9 John. 96.) That was an action of *assumpsit* against the sheriff of Columbia county, for the amount of a sale of goods by him under a *venditioni exponas*. The defendant proved that among the goods sold was a sloop, which, at the time of the sale, was at Poughkeepsie, and the purchaser afterwards refused to pay for her, on the ground that the defendant had not delivered to him the possession of the sloop; and she was afterwards sold on another execution against the same judgment debtor, by the sheriff of Dutchess county, which execution



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issued subsequently to the levy under the execution of the plaintiffs. The judge charged the jury that the plaintiffs were not entitled to recover for the amount at which the sloop sold, as it did not appear that the defendant had ever received the money. A motion for a new trial having been made, the counsel for the defendant, in opposing it, made use of the argument so strenuously urged here, that the proper remedy was an action on the case sounding in *tort*, for a breach or neglect of duty, but the court ordered a new trial, holding that the sheriff was answerable in that form of action for the amount the sloop sold for, though he had not received the money. These cases, and many others in the books, fully sustain the position that the defendant is liable for the amount of the notes, in an action for money had and received.

This view of the case disposes of the further objection taken by the defendant that the claim in suit did not pass to the plaintiff under the assignment from Cook, Clark and Carey. The assignment transferred, in terms, all the right, title and interest of the assignors and each of them, to the notes, and the avails thereof, and the moneys received by the defendant upon the selling and arranging of the claims against the railroad company. It consequently passed their right of action against him for money had and received to the full amount of the notes referred to.

It remains to advert briefly to some other positions taken by the defendant's counsel.

1. The assignment is absolute and valid on its face, and transfers to the plaintiff a perfect legal title. His right to maintain the action is not affected by the fact that nothing was paid for the assignment, (27 *Barb.* 178; 38 *id.* 575;) nor by the circumstance that Cook, one of the assignors, agreed to take care of the case and to save the plaintiff from costs if he was unsuccessful.

2. It does not appear that the defendant and the plain-

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tiff's assignors were partners. At most, they were but joint owners of the original claims against the railroad company, and there was nothing in that relation to prevent either of them from maintaining an action to recover his share of the money collected thereon by the defendant.

3. It is not apparent, as claimed by the defendant, that the referee has made a mistake in respect to the value of the defendant's services. He has probably adopted the sum stated by the defendant in his letter of the 24th August, 1861, as the measure of the compensation to which he was entitled up to that time. In that letter, the defendant does not claim any thing for disbursements in addition to the sum stated by him, and the referee was warranted in adopting that sum.

The judgment should be affirmed.

Judgment affirmed.

[MONROE GENERAL TERM, September 4, 1865. *Johnson, J. C. Smith and R. D. Smith*, Justices.]

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EASTERBROOK vs. THE ERIE RAILWAY COMPANY.

In an action to recover damages for injuries done to the plaintiff's premises by water, in consequence of the diversion of a stream from its channel by the defendants, in constructing a culvert, the legal rule of damages has no reference to the cost of removing a bar of gravel carried there by the flood. The measure of damages in that class of cases is the depreciation in the value of the plaintiff's premises occasioned by the injury resulting from the defendants' acts.

In a case where the deposit is comparatively extensive, and the cost of removing it would probably equal, if not greatly exceed, the value of the soil covered by it, the rule contemplates that the material deposited by the flood is to remain upon the land; and one of the items of damage is the depreciation in the value of the land in consequence of its remaining.

The owner of the land is therefore under no obligation to remove the gravel so deposited thereon, by reason of his having received compensation for his

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132a	202
51	94
71h	517

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damages, from the wrongdoer; nor does he incur any peril, in a legal sense, by suffering it to remain.

Hence his neglect to remove such gravel bar will not preclude an action by him for damages done by a subsequent flood, in consequence of the improper and unskillful location and construction of the culvert, by the defendants; although such gravel bar may have had some effect in deflecting the course of the flood. The case will be the same, in that respect, as if the flood had been thus diverted by the natural formation of the surface of the plaintiff's land, or as if the bar had been deposited there before the culvert was made.

**A**PPEAL from a judgment rendered at the Steuben circuit in January, 1865, on the verdict of a jury. The plaintiff, in August, 1859, became seised in fee of a farm situate in Corning, Steuben county, over and across which ran a water course, which occasionally, in times of flood in the Chemung river, overflowed its banks, passed in a northerly direction over and across the plaintiff's land, and on to and across the adjoining lands of a Mr. Noyes. Before the plaintiff had acquired title to this farm the defendants had acquired the right to construct their roadway over and across the same; in constructing the road, for the purpose of allowing the water to pass in its accustomed channel over and across the plaintiff's farm, the defendants constructed a culvert which the evidence on the part of the plaintiff tended to prove was not so located or constructed as to allow the water a free passage over the plaintiff's farm. In 1861 there was a flood in the Chemung river, when a portion of the plaintiff's premises was injured by being washed away and gullied out immediately north of the culvert. A gravel bar was then thrown up and remained at the time of a subsequent flood in 1864. The evidence tended to prove that the gravel bank thus thrown up aided, in the flood of 1864, in turning the current of the water more to the west as it passed through the culvert, and that such was its natural influence and effect, insomuch that the water of the flood of 1864 entered the plaintiff's hop yard at a point considerably above where water had ever before flowed, and thus covered the

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*Easterbrook v. Erie Railway Company.*

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ground there to a much greater extent than was ever before known. The plaintiff claimed that the injuries sustained by him by the flood of 1861, in throwing up the gravel bar, &c. immediately north of the culvert, was caused by the improper location and construction of the culvert, and brought his action to recover his damages therefor, whereupon the plaintiff and defendants agreed upon the damages alleged to have been thus sustained by the plaintiff, and the defendants paid him therefor, with costs of suit, and thus settled that controversy.

This action was brought to recover for flooding the plaintiff's hop yard by the flood of May, 1864, occasioned, as the evidence tended to prove, by the improper and unskillful location of the culvert and the gravel bank thrown up in 1861. The defendants' counsel insisted that if the current in 1864, after passing through the culvert had been thrown farther west by means of the gravel bar thrown up in 1861, and thus caused to run upon the plaintiff's hop yard where it had never ran before, the plaintiff could not recover for the injury thus sustained by the change in the current. The court instructed the jury that the question was whether the culvert had been unskillfully constructed and the injury caused by that means; and if that was the substantial cause the plaintiff's right to recover would not be affected even though the course of the water was affected to some extent by the gravel bar thrown up by the same cause previously. To this part of the charge the defendants' counsel excepted, and requested the court to charge the jury that if the flood of 1861 threw up a ridge or bar so as to change the course of the water and cause it to flow upon the plaintiff's hop yard, the plaintiff could not recover for the injury occasioned by the bar, for the reason that the defendants had settled with the plaintiff and paid for all damages done by the flood of 1861, including the throwing up of the bar. The judge refused so to charge or charge dif-

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ferently from what had been already charged on the subject, and the defendants' counsel excepted. The defendants' counsel then requested the court to charge, that the defendants were not in this action responsible for the consequences of the bar thrown up as it was in 1861. The court refused thus to charge, and the defendants' counsel excepted. The jury found a verdict for the plaintiff for \$1494.79, for which sum and costs the plaintiff recovered judgment.

*H. Gray*, for the appellants.

*Bradley & Kendall*, for the respondent.

*By the Court*, JAMES C. SMITH, J. The exceptions taken by the defendants to the charge of the judge, and to his refusals to charge as requested, proceed upon the assumption that the plaintiff is chargeable with negligence in not having removed the bar of gravel which was thrown up on his premises by the flood of 1861. Upon no other hypothesis can it be insisted that the judge erred in charging the jury that if the unskillful location and construction of the culvert was the substantial cause of the injury, the plaintiff's right to recover would not be affected, even though the course of the water was influenced to some extent by the gravel bar thrown up by the same cause previously; or that he erred in refusing to charge that the defendants are not responsible in this action, for the consequences of the bar. Indeed the defendants' counsel now claims as the basis of his argument that as his clients had compensated the plaintiff for causing the bar to be thus thrown up on the plaintiff's land, it was the business of the latter to *remove* the bar, if its removal was necessary, and that he allowed it to remain at his own peril.

But that conclusion does not follow. The compensation referred to, was for the damages which the plaintiff

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*Easterbrook v. Erie Railway Company.*

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sustained by the flood of 1861, and for aught that appears, it covered such damages only as he would have been entitled to recover in the action which he had theretofore commenced, and which was settled by the payment of such compensation. The legal rule of damages in such action had no reference to the cost of removing the bar. The measure of damages in that class of cases is the depreciation in the value of the plaintiff's premises occasioned by the injury resulting from the defendants' acts. (24 *Barb.* 273.) In a case like that which was settled by the parties, where the deposit is comparatively extensive, and the cost of removing it would probably equal if not greatly exceed the value of the soil covered by it, the rule contemplates that the material deposited by the flood is to remain upon the plaintiff's land, and one of the items of damage is the depreciation in the value of the land in consequence of its remaining. This is a far more favorable rule for the defendants in such cases than one based upon the cost of removal.

The plaintiff was therefore under no obligation to remove the gravel, by reason of his having received such compensation, nor did he incur any peril, in a legal sense, by suffering it to remain. If, as the jury are presumed to have found, the flood of water upon the plaintiff's premises in 1864, was caused substantially by the improper and unskillful location and construction of the culvert, the effect of the gravel bar in deflecting somewhat the course of the flood, has no legitimate bearing upon the question of damages. The case is the same, in that respect, as if the flood had been thus diverted by the natural formation of the surface of the plaintiff's land, or as if the bar had been deposited there before the culvert was made.

If the defendants' argument were sound, it would have the effect, not merely to lessen the plaintiff's recovery, but to defeat it altogether, since an action for damages on the ground of the defendants' negligence cannot be sustained

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Mandeville v. Guernsey.

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if negligence on the part of the plaintiff, however slight, co-operated with the defendants' misconduct to produce the injury.

I think the charge and rulings excepted to were in all respects correct, and that the judgment should be affirmed.

Judgment affirmed.

[MONROE GENERAL TERM, September 4, 1865. *Johnson, J. C. Smith and E. D. Smith, Justices.*]

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MANDEVILLE vs. GUERNSEY.

51b 99  
20ap 7

51b 99  
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The official character of an individual as sheriff in another state, and a bench warrant issued to him as such sheriff upon an indictment found in that state will not authorize him to arrest the person named therein within this state and carry him beyond its boundaries. In respect to those acts he is to be treated as a private person acting without legal process.

An arrest of a person within this state, by a private individual, without warrant, made for the purpose of forcibly abducting the arrested person from the state, and followed immediately by such abduction, cannot be justified. Such seizure and abduction, of themselves, constitute a criminal offense of high grade, both at common law and by statute.

One who has arrested another without process, or on void process, wrongfully, cannot detain him on valid process, until he has first restored such party to the condition he was in at the time of his arrest, at least to his liberty. The law will not permit him to perpetrate a wrong for the purpose of executing process, nor to use process for the purpose of continuing an imprisonment commenced without authority and by his wrongful act. *Per J. O. SMITH, J.*

Where improper evidence is received although objected to by the other party, but subsequently and before the testimony is closed, the judge orders the evidence to be struck out, and directs the jury to disregard it, the error is not cured by such order and direction if the verdict cannot be supported except by such evidence.

But where, upon the questions of fact submitted to the jury being found in the plaintiff's favor, he is entitled to recover some amount of damages, and the jury find a verdict in his favor which, under the circumstances shown by unobjectionable testimony cannot be regarded as excessive, it being

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clear that the jury, in forming their verdict, may have wholly disregarded the evidence objected to, as they were directed to do, and as was their duty to do, it will be presumed that they acted in accordance with their duty, and that their verdict was based solely upon the evidence properly before them, and by which it was warranted.

The case of *Erben v. Lorillard*, (19 N. Y. Rep. 299,) distinguished from the present.

THIS action was brought to recover damages for assault and battery, and false imprisonment. It appears from the evidence, that on or about the first day of February, 1854, the defendant came from the state of Pennsylvania, where he then resided, with three assistants, in the night time, took the plaintiff from his home in the county of Steuben, and carried him beyond the state of New York and confined him in a prison cell, in the county of Tioga, Pennsylvania, for several days, and until he was released on bail. The defendant offered proof, by way of justification, tending to show, that the crime of forgery had been committed in the county of Tioga, in the state of Pennsylvania; that the plaintiff had been indicted in that county, for that offense, and tried and fully acquitted of the charge; that at the time the defendant took the plaintiff from the state, he had in his possession, the bench warrant issued on such indictment. The counsel for the defendant, offered to prove further, that the felony mentioned in the indictment, had been committed at the time and place therein mentioned, and that the defendant had knowledge of facts and circumstances, in respect to the commission of such felony, and in respect to the person who committed it, which afforded reasonable ground to suspect and believe that the plaintiff was the person who committed the felony. This testimony was objected to, and the objection sustained by the court.

The jury found a verdict in favor of the plaintiff, for \$425; and the exceptions taken on the trial were ordered to be heard at the general term in the first instance.



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*F. C. Dininny*, for the plaintiff.

*Geo. B. Bradley*, for the defendant.

*By the Court*, JAMES C. SMITH, J. The official character of the defendant as sheriff of the county of Tioga, in the state of Pennsylvania, and the bench warrant issued to him, as such sheriff, upon the indictment found in that county, did not authorize him to arrest the plaintiff within this state and carry him beyond its boundaries. In respect to those acts he is to be treated as a private person acting without legal process.

A private individual may undoubtedly justify the apprehending of another, for felony, without warrant, upon a case of strong suspicion, if in fact such a felony were committed. (3 *Wend.* 350.) The difference between the authority of a private person and a constable or other peace officer, in this respect, is that the former is justified only in case it turn out that a felony was in fact committed, but the officer may justify the arrest whether, in fact, a felony were committed or not. (*Id.*)

But it would seem that, as a general rule, the felony which will justify an arrest by a private individual, under the circumstances above stated, must be an offense that may be tried by the courts of the state in which the arrest is made; if it be committed in a foreign state and be triable there only, it will not justify such arrest. There may be a single exception to this rule, in the case of an arrest of a person charged with the commission of a felony in a foreign state or country, for the purpose of detaining him to await a requisition upon the governor of the state in which the arrest is made, for his extradition, when such arrest is necessary to prevent his escape.

It is not material, however, to the decision of the case before us, to affirm either the exception or the rule above suggested. It is enough to assert that an arrest of a per-

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son within this state, by a private individual, without warrant, made for the purpose of forcibly abducting the arrested person from the state, and followed immediately by such abduction, cannot be justified. Such seizure and abduction, of themselves, constitute a criminal offense of high grade, both at common law, (1 *Russ. on Crimes*, 716,) and by statute, (2 *R. S.* 664, § 28.) The judge at the circuit, therefore, properly overruled the offer of the defendant to prove that a felony had in fact been committed in the state of Pennsylvania as alleged in the indictment, and that the defendant had reasonable cause to suspect that it was committed by the plaintiff.

The judge also properly denied the defendant's request to charge the jury that in estimating the damages they should not take into consideration the continued imprisonment of the plaintiff after he reached the county of Tioga. The request proceeded upon the assumption that although the arrest and imprisonment in this state were wrongful, yet the official character of the defendant, and the warrant in his hands, justified him in detaining and imprisoning the plaintiff after he had carried him beyond the state line. That position cannot be maintained. The arrest being wrongful, the defendant is liable for all the injurious consequences to the plaintiff which resulted directly from the wrongful act. The imprisonment in Pennsylvania was a continuance of the wrong which was commenced by the unauthorized seizure and imprisonment in this state. It was not justified by any process which was insufficient to justify the original arrest. A person who has arrested a party without process, or on void process, wrongfully, cannot detain him on valid process, until he has restored such party to the condition he was in at time of his arrest, at least to his liberty. The law will not permit him to perpetrate a wrong for the purpose of executing process, nor to use process for the purpose of continuing an im-

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prisonment, commenced without authority, and by his wrongful act.

The only remaining question relates to the evidence offered by the plaintiff to show the expenses incurred by him in his defense on the trial upon the indictment in Tioga county, and in preparing therefor, after he had been discharged on bail. When the evidence was offered the judge received it, notwithstanding the defendant objected that the expenses were not the direct or necessary result of the arrest, and the defendant excepted; but, subsequently, and before the testimony was closed, the judge, of his own motion, ordered the evidence to be struck out, and directed the jury to disregard it. It cannot be questioned that the admission of the evidence was erroneous. The question is therefore presented whether the error was cured by the subsequent direction. The defendant insists that it was not cured thereby, as the evidence may have had an influence upon the minds of the jury, in arriving at their verdict. If the verdict could not be supported except by the evidence in question, the position of the defendant would be incontestable. But the questions of fact which were submitted to the jury, having been found in the plaintiff's favor, he was entitled to recover some amount of damages. The jury rendered a verdict of \$425. Under the circumstances shown, by the unobjectionable testimony, the verdict cannot be regarded as excessive. It is clear, therefore, that the jury in forming their verdict may have wholly disregarded the evidence in question, as they were directed to do, and as was their duty to do under such direction. That being the case, it is to be presumed that they acted in accordance with their duty, and that their verdict was based solely upon the evidence properly before them, and by which it was fully warranted.

The defendants' counsel relies upon the case of *Erben v. Lorillard*, (19 N. Y. Rep. 299,) but it is clearly distinguishable from the present case. That was an action upon

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a parol agreement to compensate the plaintiff for his services in negotiating a purchase of land for the defendant, by a permanent lease of the land at an annual rent of eight per cent upon the purchase price. Although the agreement was void, evidence of the value of the lease was offered by the plaintiff and received, notwithstanding the defendant's objection, for the purpose of proving the value of the plaintiff's services. The judge subsequently directed the jury to disregard such evidence, but they found a verdict in favor of the plaintiff for \$2000. A new trial was ordered at special term, but the Supreme Court, at general term reversed that order and rendered judgment upon the verdict. The Court of Appeals reversed the judgment and ordered a new trial, holding that the error in receiving the evidence was not cured by the judge directing the jury to disregard it. But it is apparent from the report of the case, that *there was no testimony whatever to support the verdict except the testimony which the court instructed the jury to disregard*. This is the ground upon which the case was put by Judge Denio, in his opinion, (page 303.) Neither the facts of the case, nor the language of his opinion, authorize the position that where a verdict is fully warranted by proper evidence, it is nevertheless to be set aside by reason of the reception of improper testimony which was subsequently excluded from the consideration of the jury. It is true that judge Grover, in the same case, adverts to the familiar rule that when improper testimony is received under exception, it must be shown that the verdict was not affected by it, or the judgment will be reversed. (P. 302.) That rule applies, however, where improper testimony is not only received under exception, but is *finally submitted to the jury*, or, which is the same thing, is not withdrawn from them. In such case, the presumption arises that the jury considered the improper testimony because it was their duty to do so; but when

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they are expressly instructed to disregard it, and it is struck from the case, the presumption, as has been said, is the other way. Regarding the true ground of the decision in *Erben v. Lorillard*, to be that deduced from the reasoning of Judge Denio, I do not think the case sustains the defendant's position.

If the foregoing views are correct, the case before us is free from error, and the motion for a new trial should be denied, and judgment ordered for the plaintiff on the verdict.

Judgment for the plaintiff-

[MONROE GENERAL TERM, September 4, 1866. *Johnson, James C. Smith and E. Darwin Smith, Justices.*]

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BURRILL vs. THE WATERTOWN BANK AND LOAN COMPANY.

The defendants' bank, having on the first day of July, 1866, paid out to the plaintiff's agent a counterfeit bill, purporting to be issued by the Waterbury Bank, of Connecticut, and the agent having neglected to return it for redemption until the 17th day of September following; *Held* that if the duty rested upon the plaintiff to return the bill and notify the bank of the forgery, within a reasonable time after its discovery, the question of negligence, under the circumstances of this case, was for the jury to decide.

Where the plaintiff was in doubt, and had no ready means of detecting the forgery; *Held* that the duty of returning the bill immediately was not absolute, although its genuineness had been questioned; and that the duty of returning forged paper, in such a case, must begin, if at all, from the time the holder has what the jury shall deem satisfactory evidence of its spuriousness.

The plaintiff's agent having paid out the bill to a third person, supposing it to be genuine, and such third person having neglected for an unreasonable time, after being informed that it was counterfeit, to return it to the agent; *Held* that the defendants' bank could not avail itself of such third person's neglect, to defeat the plaintiff's action.

The defendants, being informed by the plaintiff's agent, on the third day of August, that the bill had been questioned and returned to him, but that he had paid it out again, promising to take it back if it should prove to be a counterfeit, made no answer whatever. *Held* that the jury might find, upon

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the evidence, that the defendants' bank had acquiesced in this disposition of the bill and thereby waived an immediate return thereof.

The decision in *Thomas v. Todd*, (6 *Hill*, 340,) requiring a creditor who takes forged bank paper in payment of his debt, to return or offer to return it to his debtor, before he can maintain an action upon his original demand, questioned. *Per MORGAN, J.*

Mere formal defects in the return of a commission will not be regarded on the trial.

**A**PPEAL from the order of Justice MULLIN, denying a motion for a new trial. The plaintiff had a verdict, and a motion was made upon the judge's minutes for a new trial. The motion having been denied, leave was obtained by the defendants to make a case and exceptions; and the entry of the judgment was stayed until the hearing and decision of the appeal from the order denying the new trial.

The action was brought to recover the amount of a counterfeit bank bill for \$100, purporting to be issued by the Waterbury Bank of Connecticut, paid out by the defendants to the plaintiff's agent, William G. Pierce, July 1, 1863. Pierce paid it out the next morning, to Lyman Wilson, Jr. who on the same day paid it out to his father, Lyman Wilson, Sen. The latter took it to the Jefferson County Bank, to the Union Bank and to Wooster Sherman's Bank—three banks located at Watertown—on the 11th of July, all of which banks declined to receive it. He then took it to B. F. White, who was in the employ of Pierce, (the plaintiff's agent,) told him he had offered it to the banks and they had refused it. White directed him to take it to Mr. Cook, a merchant, and he would give him small bills for it. He did so, and Cook took it and gave him small bills for it. Cook on the 22d of July sent it to the Jefferson County Bank, where it was again refused, and within about a week returned it to Wilson, informing him that it had been refused at the bank. Wilson then returned the bill to his son, and his son returned it to Pierce, the plaintiff's agent, with information that it had

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been refused at the banks. Pierce examined the bill by a detector, thought it was good and paid it out again to William Baum. That was on the third day of August. Wm. Baum, within five or six days after, sent it to the Union Bank of Watertown. It was received by the bank upon deposit and paid out by the teller on the 10th day of August, to Aaron C. Cady, who paid it out to Levi A. Johnson. Johnson deposited it in the Wooster Sherman Bank, and the latter sent it to the State Bank of Albany. It was returned by mail and the Wooster Sherman Bank gave it back to Johnson. The latter returned it to Cady, and Cady returned it to the Union Bank. The latter bank returned it to Baum, who shortly after returned it to Pierce, the plaintiff's agent. This was some time in the fore part of September. On the 17th day of September, Pierce presented it to the defendants for redemption, which was refused, and thereupon he brought this suit to recover the amount of it.

There was evidence tending to show that when Lyman Wilson, Jr. returned the bill to Pierce on the 3d of August, the latter, on paying it out to William Baum, informed him that it had been questioned, and requested him to bring it back to him if it was not good. The plaintiff then was permitted to prove that the next morning after receiving the bill back from Wilson, he communicated to the cashier of the defendants' bank the fact that the bill had been returned to him questioned, that he had examined it by a detector, and thought it good, and had passed it to Baum with a request to return it to him if rejected, and that he would then return it to the bank. This evidence was objected to, but received by the judge, to which the defendant took an exception. The witness stated that the cashier made no reply when he told him the circumstance.

The defendants requested the judge to charge the jury that the negligence of Lyman Wilson enured to the bene-

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fit of the defendants, if they found that he was negligent; which request was refused by the judge, to which the defendants' counsel excepted.

The defendants' counsel also requested the judge to charge the jury that the transfer of the bill by Pierce on the 3d of August, and the omission to tender a return to the defendants for so long a time, was such negligence as to deprive the plaintiff of the right of recovery as against the defendants. This was declined, to which the defendants' counsel excepted.

The judge charged the jury, in substance, that to entitle the plaintiff to recover, he must establish not only that the bill was counterfeit, but that he returned or offered to return it to the defendants in a reasonable time after he ascertained that it was not genuine; that negligence was not imputable to the plaintiff until he ascertained that the genuineness of the bill was disputed. To these instructions the defendants' counsel excepted. The judge further charged, in substance, that the plaintiff, having received the bill from Wilson on or about the first of August, with notice that it had been rejected by the bank, it was his duty promptly to have returned it to the defendants; that it was for the jury to determine whether the cashier of the defendants' bank, by his silence, assented to what Pierce had done in passing the bill again to Baum on the 3d of August, under the circumstances described by him, and whether Pierce had a right to believe that an immediate return was not insisted on, but that he might return it to the defendants' bank when it was returned to him by Baum. If so, then the *non*-return would not defeat the plaintiff's right to recover. To which instruction the defendants' counsel excepted.

The judge further charged that Pierce was not required to return the bill until he had notice that it was bad, and that it was important to ascertain the time when he had such notice; that mere rumor was not sufficient, but the



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information must be such as would lead a prudent man to doubt its genuineness. To this instruction there was also an exception.

The judge further charged the jury that if after the bill was returned by Baum to Pierce, he kept it an unreasonable length of time, then the plaintiff could not recover.

The defendants' counsel asked the judge to charge the jury that Pierce had sufficient notice to apprise him the bill was bad. This was declined, to which there was an exception. There were other exceptions to the charge which are not deemed material.

The defendants also took exception to the return of a commissioner for the examination of witnesses, which are sufficiently noticed in the opinion of the court.

*L. H. Brown*, for the appellant.

*James F. Starbuck*, for the respondent.

*By the Court*, MORGAN, J. It is a general principle of the common law, that upon the transfer of notes in the usual course of dealings, there is an implied warranty that they are genuine. So if a forged note is given in payment of an antecedent debt, the law will disregard it and allow the creditor to recover the original demand. In case, however, of the acceptance of a bill of exchange, which is forged, the acceptance is regarded as an adoption of the signature of the drawer; and when forged bank notes are received as payment by the bank issuing them, the same rule prevails, as the bank is supposed to know the genuineness of its own paper. Thus in the case of the *Gloucester Bank v. Salem Bank*, (17 Mass. Rep. 32,) the notes were received by the Gloucester Bank from the Salem Bank in exchange for other notes which purported to have been issued by the Gloucester Bank, and the latter bank retained them fifteen days before offering to return them. Among other

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things the court say: "There was an actual adoption of them by the Gloucester Bank as their own notes." This is put upon the ground, mainly, that the acceptor of forged paper cannot be heard to dispute the signature of the drawer, as against a *bona fide* holder. The court further say: "When a debt is paid to a bank in notes purporting to be their own, and which they have the best means of detecting if spurious, nothing short of an immediate notice to the payor and demand of him for payment, can authorize an action for the money." The same doctrine was held in the case of *The Bank of the United States v. Bank of Georgia*, (10 *Wheaton*, 333,) where the payment was made *bona fide* in its own notes, which were afterwards discovered to be forged.

It is very difficult to apply the principle of these cases to transactions between third persons who are in no wise parties to the paper and who have no ready means of detecting forgeries. In the case of forged promissory notes, it is believed that it has never been applied so as to defeat an action brought by the creditor upon the implied warranty of genuineness. It is said in *Parsons on Notes and Bills*, (2 *Parsons*, 601,) that in case of forged *bank notes*, it is certain from the cases cited and others, that the money or the goods given for them may be recovered back *at any time*, without reference to the question whether the forgery was seasonably or immediately discovered, and notice immediately given."

The late Supreme Court of this state, in *Thomas v. Todd*, (6 *Hill*, 340,) extended the principle so as to include third persons who could be presumed to know nothing of the genuineness of the paper, except what could be gathered from the opinions of others. The plaintiff in that case had taken a counterfeit bill in payment for rent, and it was held that he could not recover, because he neglected for nearly two months to return the bill. The judge says: "Both parties have agreed that the thing should be re-

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ceived in payment, and although they were acting under a mistake as to the nature or value of the thing paid, yet as the creditor has acted honestly, he can only be put in the wrong by an offer to correct the error. Although the bill had no intrinsic value, it should be returned to the debtor, so as to enable him to trace back and fall upon the person from whom he received it. And for the same reason it should be returned without unnecessary delay."

This was the view of the law taken by the learned justice on the trial of this action, and if *Thomas v. Todd* is to be received as authority, the exceptions must be tested by the rule there laid down.

It is material however to observe, that the bill which is alleged to be counterfeit purported to have been issued by a foreign corporation, and was so good an imitation of the genuine that it is now seriously contended by the defendants' counsel that the proofs failed to show that it was a spurious bill.

If the law makes it the duty of a party receiving a counterfeit bill in payment of a debt, to return it within a reasonable time after he has discovered that it is counterfeit, it may admit of grave question, *when* he shall be deemed to have sufficient knowledge of its character to require him to make an offer to return it.

In this case we have the evidence of the plaintiff that after the bill had been returned to him in August, he compared it with a detector and thought it was genuine. It afterwards passed through two banks at Watertown as a genuine bill, although these very banks had each rejected it upon a prior occasion.

While I am of opinion that bank bills, which pass as money, and are taken in payment as money, should be governed by somewhat different rules from other forged paper, I very much question whether it is competent for the courts to establish any such rules. In general a party

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receiving payment in something of no value is not bound to return it before he is entitled to sue upon the first demand. I think the case of *Thomas v. Todd* stands almost alone, although its authority derives considerable force from what is said by the judges in the two cases already cited.

The doctrine established in *Thomas v. Todd* is, that a person who takes a counterfeit bank bill as genuine, in payment as money, *owes a duty to the person from whom he received it*, to return it without unnecessary delay, in order that it may be traced back and the loss be made to fall upon some other party.

It is obvious that in a majority of cases, some innocent third person would have to stand the loss. In case of forged promissory notes, the original forger or utterer, may be found out, and perhaps punished in addition to being made criminally responsible for the forgery. But in case of counterfeit bank bills, the original guilty parties are seldom if ever found out. So if the rule established in *Thomas v. Todd* should prevail in this state, the only effect of it would be to throw the loss upon some innocent third person instead of the defendant in the action.

It will also be observed that in case of doubt, there is no certain test by which the holder of a note, alleged to be counterfeit, can be satisfied of its spuriousness. In a majority of cases, the opinion of an expert might be taken with safety and perhaps acted upon; but it is not the province of the courts to establish rules of evidence by which the conduct of individuals should be governed in such cases. It is rather the province of the legislature.

I am not satisfied that the law creates an absolute duty upon the creditor to return forged bank paper to his debtor before he is allowed to sue him upon an implied warranty of genuineness. But if there is any such duty in this case, it is not to be governed by the same strict

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rules which apply to the dishonor of notes and bills of exchange, in order to charge the indorser. No certain time can be fixed, when notice of dishonor must be given to the debtor. It can hardly be pretended that it is sufficient to make the duty *absolute*, because the bill has been thrown out by a single bank; and especially when, as in the case at bar, it was merely doubted and declined. The duty of returning the bill must begin, if at all, *from the time the holder has what the jury shall deem satisfactory evidence that it is spurious*. If the rule is to be admitted at all, it cannot with propriety be extended to doubtful cases, where there is no evidence of bad faith on the part of the plaintiff.

In the case at bar, there is certainly no sufficient evidence to charge the plaintiff with negligence, until he received the bill back from Wilson on the 3d of August, 1863. The testimony then is that Pierce, the plaintiff's agent, received it back from Wilson with notice that it had been disputed by the banks at Watertown; that he took it and examined it by a detector, thought it genuine, and paid it out again to Mr. Baum with a request if it was rejected, to return it; that he notified the defendants' bank what he had done with the bill, to which no reply was made. The judge left it to the jury to determine as a matter of fact, whether the defendants' bank acquiesced in this disposition of the bill, and if it did, he informed the jury that it excused the plaintiff from returning it to the bank until Baum returned it to him. In my opinion this was a more favorable view of the case for the defendants' bank than it had a right to insist upon, if the jury believed from the evidence that Pierce acted in good faith in his dealings with Baum. If he believed in good faith that it was genuine, after he had examined it by aid of a detector, he could not be charged with negligence, as a

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matter of law, for not then returning it to the defendants' bank.

Although the bill had been thrown out by the banks at Watertown before Pierce received it back from Wilson, the evidence does not show that it had been pronounced a counterfeit bill by any of them. The most that can be claimed by the defendants' bank is that it had been doubted and declined. Mr. Pierce then undertook to examine it by the aid of a detector, and he testifies that he thought it genuine. It may be that this was only a pretense, and that he did not, in fact, believe any such thing. But certainly this was a question for the jury to determine, and not for the court. It was not enough that the bill had been doubted, but the question is whether Pierce believed, as he had a right under the circumstances to believe, that it was a genuine bill. The defendants' exceptions, without disputing the good faith of Pierce, required the judge to charge, as matter of law, that Pierce was guilty of negligence in not immediately returning the bill to the defendants on the third of August. In my opinion, the exception is not well taken, as the question of negligence was one for the jury, and not for the court to decide.

I do not find in the case what were the circumstances under which Pierce kept the bill after it was returned to him by Baum, before he offered to return it to the defendants' bank on the 17th of September. It appears that Baum returned it to Pierce the *fore part of September*, but the day is not stated. If it was deemed important by the defendants' counsel that the attention of the jury should have been called to this particular period of time, an appropriate request should have been made to the judge with reference to a state of facts which the jury might have found, and upon which an exception could have been taken. We do not know how long the delay was, nor the circumstances under which it occurred. If the delay was

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unreasonable the jury were told the plaintiff could not recover. The judge was not asked to charge what would be an unreasonable delay, nor what circumstances would excuse the delay.

If, therefore, the plaintiff is to be charged with the duty of returning the bill without unnecessary delay after it was ascertained to be spurious, there is nothing to show that this was not a proper case for the jury to determine the fact of negligence.

Another ground of objection to the verdict is, that the jury were instructed that the omission of Wilson to return the bill to White or Pierce for an unreasonable length of time after notice that it was spurious, would not avail the defendants in this action. This objection is based upon the theory that Pierce had no right to redeem the bill so as to charge the defendants, if he had a good ground of defense against Wilson, on the ground of his neglect to return it to Pierce. No authority is cited to sustain such a proposition. I am not aware of any principle upon which it can be vindicated. The plaintiff owed no duty to the defendants which required him to refuse to redeem the bill. He was not bound at his peril to refuse to redeem it for the benefit of the defendants.

I have also examined the defendants' exceptions to the depositions taken on commission. They were filed in October, 1864, a year before the trial, and were then open for the inspection of the defendants' counsel. They appear to be in proper form. The commissioner signed his name on the margin of each sheet, and this was sufficient without signing it at the bottom. They also appear to have been properly attached and certified.

Mere formal objections to the return of a commission will not, in general, be regarded at the trial; and I think the practice is a good one which requires the party objecting on such ground, to move the court, before the trial,

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to suppress the deposition in order to avail himself of them.

The order denying a new trial in this case should be affirmed, with costs.

BACON, FOSTER and MULLIN, JJ. concurred in the result.

New trial denied.(a)

[ONONDAGA GENERAL TERM, JANUARY 1, 1867. *Morgan, Bacon, Foster and Mullin*, Justices.]

(a) See *Kenny v. First National Bank of Albany*, (50 Barb. 112,) where the opinion follows the authority of *Thomas v. Todd*, although the point was not directly involved. Two cases are cited from our own reports in addition to *Thomas v. Todd*. One of them, (*Markie v. Hatfield*, 2 John. 455,) is decided upon grounds apparently inconsistent with the doctrine declared in *Thomas v. Todd*; for it holds the naked proposition that the receipt of forged bank paper is no payment, but the party to whom it is paid may treat it as a nullity and resort to the original contract. The other case cited is *The Canal Bank v. The Bank of Albany*, (1 Hill, 287,) where the plaintiffs' bank was allowed to recover back money advanced to the defendants' bank on a forged draft, although notice of the forgery was not given for more than two months. Cowen, J. said he was not willing to concede that delay, in the abstract, as seems to be supposed, can deprive a party of his remedy in such a case. The cases cited by him from the English reports, where such delay has been held to amount to a defense, (some of which he disapproved,) were generally cases where the party taking forged paper was presumed to know the hand-writing, as in the case of an acceptor of a bill of exchange who is presumed to know the hand-writing of the drawer, or of bankers who are supposed to know the signatures of their officers, agents and customers.

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BARBER vs. MORGAN.

The complaint in an action for deceit or fraud in the purchase or sale of property, induced or procured by false representations, must in substance state the representations, and aver their falsity and that they were made with intent to deceive the plaintiff and induce him to make the purchase or trade in question, and that they did induce such trade, to the plaintiff's injury.



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Where, in such an action, there was nothing in the first count of the complaint which amounted to an allegation or averment that the defendant made the representations to induce the plaintiff to make the purchase of the property, or with intent to defraud or deceive him; or that such representations in fact induced the purchase of the property; *Held*, on demurrer, that the count was defective, in these particulars.

The second count of the complaint alleged that the defendant represented to the plaintiff that a company, known as "The New York and Santa Fe Mining Company," was a duly organized corporation with an original capital stock of \$5,000,000, of the par value of \$100 per share; that said company had very valuable mines which it was then working; that the yield of its mines was of immense value; and that said company would certainly pay quarterly dividends, in gold, of six per cent; and that the stock of the company was very hard and almost impossible to be obtained, it was so valuable. The complaint then alleged that the defendant affirming and declaring that he knew each and every one of such statements to be facts, induced and advised the plaintiff to purchase of and through him four hundred and eighty shares of the capital stock of the said company, which he did purchase, and paid therefor the sum of \$18,876; the plaintiff believing and confiding in each and all of the said statements and representations to be true. The count then averred that each and every of said statements were false and were fully known to the defendant to be false.

*Held* that these allegations, together, imputed and implied a fraud purposely and intentionally committed upon the plaintiff, by the defendant, and that the count might therefore be sustained.

*Held, also*, that the plaintiff could not be required to prove, on the trial, any thing more than the representations set forth, the fact that the defendant procured and induced him, in reliance upon such representations, to make the purchase of the stock as stated, and then to prove the utter falsity of such statements and representations, and that the defendant knew them to be false when he made them. That this would make out a clear and complete cause of action, except proof of damages.

**A** PPEAL by the defendant from an order made at a special term, overruling a demurrer to the complaint. The complaint alleged, in the first count thereof, that on or about the 31st day of January, 1865, and at various other times the defendant represented to the plaintiff that there was an actual and duly organized company or corporation known as the New York and Washoe Mining Company, with an original capital stock of about one million of dollars—each share of the par value of \$100—and doing business under the general laws of the state of New

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York in such case made and provided. That the defendant then and there represented to the plaintiff and to other persons on his behalf that he, the defendant, had full power and authority to sell and transfer \$50,000 of said capital stock, and could, and would sell the same, or some, or any part of it, and for \$50 in gold, would give one share of said capital stock of the par value of \$100. That the defendant then and there further represented to the plaintiff that the said company was the owner of a large mine, in the territory or state of Nevada, containing gold and silver quartz, and which was a splendid mine; that the said company would divide not less than six per cent quarterly, in gold, and more, commencing May 1, 1865. That the said company was also the owner of a splendid mill located at said mine, and was then and there crushing forty tons per day of its quartz, at a net profit of \$35 per ton, and then and there adding and declaring that there was no doubt about the matter, and that by moving quick, he, this plaintiff, and others, his friends, who might desire to purchase, could have said stock. That the plaintiff had no knowledge, and was wholly ignorant of the existence or non-existence of the facts and circumstances, each and every of them, as above alleged, and as to the truth or falsity of the said representations and each and every of them, at the time of and prior to the making of the same. And the plaintiff alleged that he, then and there, in good faith, accepted and adopted, and believed the above alleged statements and representations, each and every of them, as being strictly true. And that he, solely in the belief and conviction of the actual truth of each and every of them, did purchase from said defendant, seventy-five shares of said capital stock of said New York and Washoe Mining Company, paying therefor at the rate of \$50 gold for each and every share, and which, at the premium which gold then commanded in the market, amounted in greenbacks, so called, to the sum of \$7762.50, and which was the actual

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amount so paid by the plaintiff to the defendant for said seventy-five shares. And the plaintiff alleged, upon information and belief, that each and every of said alleged representations and statements so as above made by the defendant, were false and untrue; and said defendant well knew them to be false and untrue. That said company did not then and there own a mine of any value, and was not the owner of a splendid mine, or any mine. That said company was not crushing then and there forty tons of its quartz per day at a net profit of \$35 per ton. That said company never have and never could, from earnings, or any other honest way, pay six per cent quarterly in gold on the par value of its stock, or otherwise; but on the contrary the plaintiff alleged, upon information and belief, that the said company's property was of little or no value, and said company was then in an unsafe financial condition, and is now largely burdened with debts and mortgages, all of which the defendant well knew. That the said defendant was one of the original projectors and getters up of the said company, and as such knew from its inception and beginning all about the said company and its pretended property, and the falsity of all of the above statements so made as aforesaid by him, and has, during all the time, more or less counseled, advised and governed the management of the same. And the plaintiff alleged that the defendant, by means of the premises, then and there falsely and fraudulently deceived the plaintiff on the said sale, and thereby the stock so purchased as aforesaid, has become, and is of no use or value to the plaintiff, and the plaintiff had sustained great loss thereby, to wit, the full amount of \$7762.50, so paid as aforesaid for said stock, together with interest on the same.

And the plaintiff, for a further and second cause of action, alleged that on or about the 25th day of March, 1865, and various other times, the defendant represented to the plaintiff that there was an actual and duly organized

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company or corporation known as the New York and Santa Fe Mining Company, of Nevada, with an original capital stock of five million dollars of the par value of \$100 per share, and doing business under the general laws of the state of New York, in such case made and provided. That the defendant represented to the plaintiff and other persons on his behalf, that the said New York and Santa Fe Mining Company was then and there possessed of and the owner in fee of a very valuable property in the territory or state of Nevada, with a mile square of territory, and also of several valuable mines located upon said territory, and which mine and mines contained very rich veins of silver and large quantities abounded therein; that the said company was then and there getting out of said mine and mines large quantities of very rich silver quartz for the mill which the said company then had ordered, of eighty stamps, and which mill would be in operation in said property by the first of November, 1865. That the said mine and mines on said property were the richest silver mines in the country and inexhaustable in silver, and that the said company was working the said mine as a mine, and that the yield was of immense value. That said territory was covered with numerous valuable ledges of silver; that said company would certainly pay from its net earnings of said mines quarterly dividends in gold of six per cent or more; that the stock of the company was very hard and almost impossible to be obtained, it being so valuable. That the defendant, affirming and declaring to the plaintiff that he knew each and every one of the statements and representations herein above set forth to be facts, thereby induced and advised the plaintiff to purchase of, and through him, the said defendant, 480 shares of the capital stock of the said New York and Santa Fe Mining Company, and which said 480 shares the plaintiff did purchase through the said defendant, and paid therefor the sum of \$13,370.60 cents. That the plaintiff, believ-

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ing and confiding in each and all of the above mentioned statements and representations to be true, and so believing the truth of each and all of them as made by said defendant, did make the purchase as aforesaid, and did pay the said sum of money as aforesaid. That afterwards, and in and during the month of April, 1865, the defendant again reiterating and renewing said several statements and representations as above set forth concerning the said New York and Santa Fe Mining Company, and its property and mines to this plaintiff, and this plaintiff then fully believing and confiding in the truth of each and all of said statements and representations so as aforesaid, made by the defendant, and being then entirely ignorant of the truth or falsity of the same, did then and there purchase sixty shares more of the capital stock of the said New York and Santa Fe Mining Company, and did pay therefor the sum of \$1459.98. The plaintiff further alleged, upon information and belief, that each and all of the statements and representations so as aforesaid made by said defendant to him, were and are false and untrue, and was fully known to said defendant to be false and untrue. That as the plaintiff has been informed and believes, it was false and untrue that the said New York and Santa Fe Mining Company was, at the time of the alleged representations made by the defendant, the owner in fee of any valuable mine or mines, or of any mine, or of one mile square of territory, or any territory, or that the said company, or any of them, was then getting out of said mine or mines, large or any quantities of rich silver quartz, or that the mine or mines were being worked at all—or that the said company then, or at any other time, had ordered an eighty stamp mill, or that such a mill was to be in operation on the first of November, 1865, or at any other time. That it is false and untrue that the said mine, so pretended to be on said property of said company, was the richest mine in the country for silver, or inexhaustible, or that

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the yield or product from the same was of immense value, but in truth and fact, the plaintiff alleged on information and belief that the said pretended mine was utterly worthless, and was abandoned by said company, all of which the defendant well knew. That the said company have never paid any dividends whatsoever, and that it was and is false and untrue, that the company would pay any dividends, or six per cent quarterly in gold. And the plaintiff further alleged, upon information and belief, that the defendant was one of the original projectors and getters up of the said New York and Santa Fe Mining Company, and as such, was then cognizant of all its business transactions, and advised and assisted in the management of the same, and also well knew about the pretended property of said company. That he well knew that said company was incorporated upon a fictitious basis and corrupt principles, and could not in the nature of things become or be of any value. And the plaintiff averred, upon information and belief, that said company, as also its property and stock are of no value, and, in fact, never was. All of which, and the falsity of each and all of said statements and representations as hereinbefore set forth, the said defendant well knew at the time of making the same to the plaintiff. And the plaintiff further alleged that at the times of and prior to the making of said statements and representations by said defendant, he, the plaintiff, had no knowledge, and was, in fact, wholly ignorant of the existence or non-existence of the facts and circumstances, each and every of them, as above alleged to have been stated and declared by the defendant, and as to the truth or falsity of each of said statements and representations. That the defendant, by means of the premises falsely and fraudulently deceived the plaintiff, and induced him to purchase the said stock and thereby the said stock so purchased has become, and is of no use or value to the plaintiff and the plaintiff had sustained great loss thereby, to wit, the full amount,

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\$14,830.56, so paid as aforesaid, for said stock, together with interest on the same. The plaintiff alleged that prior to the commencement of this action, he tendered and offered to transfer to the defendant the scrip for said seventy-five shares of the capital stock of the said New York and Washoe Mining Company, so purchased and received by the plaintiff, and demanded of the defendant, that the said sum of money so as aforesaid paid by the plaintiff, be repaid by said defendant to him, but which said defendant refused so to do. The plaintiff further alleged that prior to the commencement of this action he tendered and offered to transfer to said defendant the scrip for the said 540 shares of the capital stock of the said New York and Santa Fe Mining Company, of Nevada, so as aforesaid purchased and received by the plaintiff, and then and there demanded of said defendant, that the said sum of money so as aforesaid paid by the plaintiff, be repaid by said defendant to the plaintiff, but all of which said defendant refused to do. Wherefore the plaintiff demanded judgment against the defendant for the damages which he averred he had sustained by reason of the premises, to wit, \$22,593.06, and interest thereon, together with costs.

The defendant demurred to the first count or cause of action as alleged in the complaint, and specified the following as the ground of objection to said first count, to wit: That there are not sufficient facts stated in said first count, to constitute a cause of action in favor of said plaintiff against him, the said defendant.

The defendant also demurred to the second count or cause of action, as alleged in said complaint, and specified the following as the grounds of objection to said second count of the complaint, to wit:

1st. That there are not sufficient facts stated in said second count to constitute a cause of action in favor of said plaintiff, against him, the said defendant.

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2d. That several causes of action have been improperly united in said second count of the complaint.

On argument, at special term, the demurrer was overruled, and judgment ordered for the plaintiff, with leave to the defendant to put in an answer within twenty days, on payment of costs.

*D. Wright*, for the appellant. I. There is no allegation that the stock was not, *at the time the plaintiff purchased it*, worth all he gave for it. The only statement in regard to that matter is, that "defendant represented to the plaintiff that there was an actual and duly organized company or corporation known as the New York and Washoe Mining Company, with an original capital stock of about one million of dollars, each share of the par value of \$100." This is the *only* allegation in the first count in regard to the value. There is an allegation at the conclusion of the count, "that the said defendant by means of the premises, then and there falsely and fraudulently deceived the said plaintiff on the said sale, and *thereby* the stock so purchased as aforesaid, *has become, and is* of no use or value to this plaintiff, and this plaintiff has sustained great loss thereby, to wit, the full amount \$7762.50, so paid as aforesaid for said stock, together with interest on the same." As a pleading this is simply absurd; that the stock of a mining company became of no value, by reason of the false and fraudulent representations of any one in regard to its property or affairs, is a *non-sequitur*. Strike this out and there will be no allegation upon the subject left. Merely to conclude by saying the plaintiff has suffered damage can hardly be held to be good pleading in any court. All that is stated in this count may be strictly true, and the stock may very well have been worth par, in gold, *at the time the plaintiff purchased it*. That it became worthless afterwards to the plaintiff, will not charge the defendant. And this alone should sustain this demurrer.



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In the case of *Bennett v. Judson*, (21 *N. Y. Rep.* 238,) the complaint states that the land was *comparatively worthless*, speaking as of *the time of the sale*. In the case of *Zabriskie v. Smith*, (13 *N. Y. Rep.* 322,) the complaint states "but Smith was then (alluding to the time of the representations) and has been ever since insolvent." Suppose the plaintiff in that case had alleged that Smith *thereby became* insolvent, &c. would any court deem the allegation sufficient, or even pertinent? In the case of *Newberry v. Garland*, (31 *Barb.* 124,) the allegation was, referring to the shares, "the same being then of no value." In the case of *Cazeaux v. Mati*, (25 *Barb.* 579,) the allegation was "the stock worth par, and the market price thereof about the same." But it is useless to multiply authorities. It will not be contended that any recovery can be had without proof that the stock *at the time of the purchase* was less than the price paid. If necessary to be proved, it must be averred.

II. There is no allegation that the stock has ever been of less value than \$50 per share in gold. The only allegation upon that subject is, that *thereby*, that is by reason of defendants representations, "the stock so purchased as aforesaid *has become*, and is, of no use or value to *this plaintiff*." Notwithstanding, it may be worth par in the market. The measure of damages is not what the stock is worth *to the plaintiff*; no other damage is alleged, and therefore the complaint does not state facts sufficient to constitute a cause of action.

III. There is no averment, anywhere, in this count, that the defendant *made* the representations falsely and fraudulently, and with *intent to deceive* anybody; without that averment, there can be no cause of action. The jury must find that *as a fact*, or the plaintiff cannot have a verdict. It cannot be found unless alleged. The case of *Addington v. Allen*, (11 *Wend.* 374,) settled this question in this state. The complaint in this case cannot be sustained without

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overruling the case of *Addington v. Allen*. (See *Fance v. Martin*, 3 Seld. 210.) The same rule prevails since the Code. (*Wells v. Jewett*, 11 How. Pr. 242. *Mead v. Mali*, 15 id. 347. *Palmer v. Smedley*, 18 id. 321.) In the case of *Morse v. Swits*, (19 How. 275,) the court held that the allegation that the report "was made with intent to deceive and defraud the holders and owners of the stock of said bank, and those who might become purchasers and owners thereof" was sufficient. This is the strongest case which can be found for the plaintiff, but it will not sustain his declaration. For in that, there is no averment of *any intent* whatever. In the case of *Cazeaux v. Mali*, (25 Barb. 578,) the averment was that the representations were made "for the purpose of inducing parties, particularly the plaintiff, to purchase said stock," which the court, on demurrer, held to be sufficient. In the opinion it is said "the representation must be false in fact, and so known to the defendant; must have been made with *the intent to deceive*, &c. (P. 583.) On page 584, the court say: "The rule is saved from too great laxity in all these cases, by one indispensable part of it, namely, that in all cases it is asserted that the false representation, or the concealment which made the partial statement practically false, should be made with the intent to deceive," (citing *Addington v. Allen*, in Court of Errors.) This being a general term decision and directly in point, ought not to be overruled, even were it doubtful, which it is not. The same was held to be the law in the case of *Newberry v. Garland*, (31 Barb. 122,) where *the intent* was distinctly alleged. (See p. 129.) In the case of *Zabriskie v. Smith*, (13 N. Y. Rep. 322,) the averment was that the defendant wrongfully and deceitfully encouraged the plaintiff to sell goods to one Sayre; "that *in order to induce them to do so*, the defendant, in April, 1849, sent a letter," &c. Judge Denio, in his opinion, (p. 330,) says: "In *Allen v. Addington*, (11 Wend. 374, 386,) the court for the correction of errors,

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decided that in an action of this kind the plaintiff must aver that the false representation was made *with intention to deceive and defraud him*. Under our present system of pleading, I conceive that a complaint should contain the substance of a declaration under the former system," &c. and he held the averment in this case sufficient. This case was not a demurrer, but after verdict, and yet the reasoning of Judge Denio is amply sufficient to sustain the demurrer. Hand and Marvin, justices, were for reversal. I submit that this case has gone as far as the facts can go to sustain a complaint, even after verdict. In the case of *Bennett v. Judson*, (21 N. Y. Rep. 238,) the averment was, "that the defendant, for the purpose of effecting a sale to the plaintiff of certain lands, &c. made false and fraudulent representations," &c. In *Thomas v. Beebe*, (25 N. Y. Rep. 244,) the case does not warrant the head note. The declaration alleged that "*in consideration that the plaintiff would buy of him a farm, &c. falsely and fraudulently represented and alleged that said farm contained ninety acres of land.*" There was not only no demurrer, but the cause was fully tried upon the merits without any objection being taken to the insufficiency of the complaint. Some question *seems* to have been made upon the argument in regard to the sufficiency of the complaint, although nothing of the kind appears in the statement of the case. For Judge Selden, in his opinion says: "It is not stated that *the defendant knew that the farm did not contain ninety acres.* The complaint was doubtless sufficient, (2 John. 550,) but assuming that it may have been defective, the cause was tried without objection on that account, both parties introducing evidence bearing upon the question whether the misrepresentation was willful, and the case must be considered now, as if the *scienter* had been fully alleged, assuming such allegation to be necessary." This cannot *decide* the case before the court, because, 1st. The question now before the court was not hinted at in that case. The

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question tried to be raised, was, whether it was necessary to allege that the defendant *knew the representation made by him to be false*. Quite another and different question from what he *intended* by his representation. 2d. No such objection was taken either by demurrer, or upon the trial, and of course it could not be taken for the first time in the Court of Appeals, and hence it was not before the court. 3d. The case cited by Judge Selden, (2 *John*. 550,) was good authority for the remarks made by him, as the same question was involved in that case, as the judge was then considering; but that it is not an authority to uphold this complaint against a demurrer, will appear by reference to the remarks of Senator Tracy, in the case of *Addington v. Allen*, (11 *Wend*. 374.) He there says: "But if this count stated, what clearly it does not, that the plaintiff gave the credit to Baker, in consequence of representations made by the defendant, and that these representations were untrue, and known to be untrue when made, yet there is still wanting an 'indispensable averment, which is, that the defendant made the representations *with an intention to deceive and defraud the plaintiff*.' It has been seen in the cases already cited, and especially *Ames v. Millward*, (2 *Moore*, 713,) that the mere assertion of a falsehood by one party, although producing damage to another, will not sustain the action unless the *intention to defraud* is also proved. *This intention, therefore, should be distinctly alleged in the declaration, for it constitutes the very gist of the action.* In *Bayard v. Malcom*, (2 *John*. 550, the same case cited by Judge Selden,) Senator Clinton forcibly remarks, 'to say that the plaintiff need not state the very fact which constitutes his right of action, is not only repugnant to the dictate of common sense, but is counter to the whole consent of authorities,' &c. In the case of *Smith v. Countryman*, (30 *N. Y. Rep*. 655,) the allegation was, that the statement "was false and fraudulent, was made to deceive and

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defraud the defendant." In the celebrated case of *Hubbard v. Briggs*, as reported in 31 *N. Y. Rep.* 518, the form of the complaint is not given, and no question was made in regard thereto. In the case of *Mead v. Bunn*, (32 *N. Y. Rep.* 275,) the form of the complaint is not given, but it is evident from the opinion of Porter, J. that the *scienter* was proved, and therefore it is right to presume that it was alleged. I have now cited the cases from 5 *John.* to 32 *N. Y. Rep.* and not one can be found to sustain a declaration in deceit, against a demurrer, wherein it is not alleged that the representations were made *with intent to deceive or defraud*. That they were falsely and fraudulently made will not answer. The gist of the action, as is truly stated by Senator Tracy, in the case of *Addington v. Allen*, is the *intent*, and it must be affirmatively alleged. Justice Johnson, in his opinion in this case, mentions as one of the necessary facts to constitute the cause of action, "that the party making it, knew it to be contrary to the fact; or that he *intentionally* made the representation whether it was true or false; for the purpose of inducing the other party to act upon it." And yet he held the complaint sufficient which did not allege such *necessary fact* to exist. Even the Code requires "a plain" and concise statement of the facts "constituting a cause of action" to be stated. (§ 142, *sub.* 2.) This has not been done in this case, for that these alleged representations were made *with intent* to defraud is one of the facts which must be found, and it is not alleged.

The order overruling the demurrer should, therefore, be reversed.

The second count must share the fate of the first, and I will offer no separate argument in regard thereto.

*T. R. Strong*, for the respondent. I. The first count in the complaint states a perfect cause of action; positive

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representations by the defendant to the plaintiff, and others in his behalf, about matters of which the defendant professed to have full knowledge, to induce a purchase by the plaintiff of the defendant of stock, and calculated to influence the plaintiff to make the purchase; the belief of the plaintiff of the truth of the representations, he having no knowledge to the contrary; and his purchase of stock; confiding in and influenced by the representations; the falsity of the representations; the knowledge by the defendant of their falsity, and the loss and damage thereby to the plaintiff. Here is every element of a cause of action for fraud.

The representations alleged are: To the plaintiff, that there was an actual and duly organized company, or corporation, &c. with an original capital stock of about \$1,000,000; each share of the par value of \$100. To the plaintiff, and others on his behalf, that the defendant had full power and authority to sell and transfer \$50,000 of the stock for \$50 a share in gold. To the plaintiff, that the company was the owner of a large mine in Nevada, containing gold and silver quartz, which was a splendid mine; and the company would not divide less than six per cent quarterly in gold. That the company was also the owner of a splendid mill at the mine, and was crushing forty tons of quartz per day, at a profit of \$35 per ton; that there was no doubt about the matter, and that by moving quick the plaintiff and his friends could have said stock. It appears upon the face of the representations they were made to influence the plaintiff to purchase stock. As to the plaintiff having confided in, and been influenced by the representations to make the purchase, it is alleged that he had no knowledge to the contrary thereof; that he accepted and believed them, and solely in such belief, purchased seventy-five shares of stock, paying therefor \$50 in gold, per share, making in all \$7762.50 in currency. The falsity of each and every of the representations is then

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alleged; and it is particularly averred that the company did not own a mine of any value; was not the owner of a splendid mine, or any mine; that the company was not crushing forty tons of quartz a day at a net profit of \$35 a ton; could not pay six per cent quarterly in gold; that the company's property was of little or no value; the company was in an unsafe financial condition; all of which the defendant well knew. And it is alleged the defendant knew the representations to be false and untrue; that he was one of the proprietors and getters up of the company, and knew all about it and the falsity of the statements. It is averred that the defendant, by means of the premises, falsely and fraudulently deceived the plaintiff on the sale. The intent of the defendant to defraud the plaintiff, necessarily follows from the allegations made, and is substantially and fully stated. As to the damage to the plaintiff, it is alleged that the stock became and is of no use or value to the plaintiff, and he has sustained great loss thereby, and to the full amount paid by him for the stock, being \$7762.50, with interest thereon. (*See Sharp v. The Mayor, &c.* 40 Barb. 256; *Bennett v. Judson*, 21 N. Y. Rep. 238; *Craig v. Ward*, 36 Barb. 377; *Newbery v. Garland*, 31 *id.* 121.)

II. The second count also states a perfect cause of action, for the like reasons given in respect to the first. And it is not subject to a demurrer for improperly uniting different causes of action. It states but a single cause of action. But if it states more than one, the two are not causes of action which cannot properly be united.

Where a single count states two or more causes of action, the remedy is not by demurrer, but by motion. (*Fickett v. Brice*, 22 How. Pr. 194. *Id.* 270. 4 Abb. Dig. p. 479. 16 Abb. Pr. 466. See note to § 144, subd. 5, *Voorhies' Code*, 1867.) Redundant irrelevant matter, is no ground of demurrer.

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*By the Court*, E. DARWIN SMITH, J. The complaint in an action for deceit or fraud in the purchase or sale of property induced or procured by false representations—and such is this action—must in substance state the representations, and aver their falsity, and that they were made with intent to deceive the plaintiff and induce him to make the purchase or trade in question, and that they did induce such trade, to the plaintiff's injury. Deceit or fraud with damages gives a good cause of action. Since the case of *Pasley v. Freeman*, (3 Term Rep. 51,) this has been settled law. The complaint in this action contains two counts. The demurrer is to each and to both counts upon the ground that they do not respectively state facts sufficient to constitute a cause of action. The representations made, and their falsity, and that the defendant knew of their falsity, are clearly and positively stated with sufficient distinctness, in both counts, and no question is made in respect to these allegations. The chief objection to the complaint urged on the argument in support of the demurrer was that the complaint does not, in either count, sufficiently aver that the false representations were made with intent to deceive the plaintiff, or to induce him to purchase the stock in question, and that the damages are not alleged with sufficient certainty. In *Addington v. Allen*, (11 Wend. 402,) it was held that a complaint in an action for false representations must aver that the defendant made the representations *with an intent to deceive and defraud the plaintiff*. Neither count in this complaint contains such averment, in express terms, and if the Code has not changed or modified the rules for the construction of pleading in such cases, this objection must prevail. In the case of *Addington v. Allen* the objection was held valid, after verdict, and the judgment arrested for such defect in the declaration. Within this case and numerous others following it since, in this court and the Court of Appeals, I do not think the first count in this complaint can be



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sustained. It is our duty to construe pleadings liberally, under the Code, but there is nothing in substance in the first count which amounts to an allegation or averment that the defendant made the representations to induce the plaintiff to make the purchase of the stock in question, or with intent to defraud or deceive him, or that such representations in fact induced the purchase of said stock. This is of the essence of the cause of action, and must be in substance alleged. (*Morse v. Swits*, 19 *How. Pr.* 275. *Cazeaux v. Mali*, 25 *Barb.* 578. *Zabriskie v. Smith*, 13 *N. Y. Rep.* 322.) But within the rule asserted in the case of *Zabriskie v. Smith*, I think the second count may be sustained. In that case Judge Denio says: "Under our present forms of pleading I conceive that a complaint should contain the substance of a declaration under the former system. It is sufficient, however, that the requisite allegations can be fairly gathered from all the averments in the complaint, though the statement of them may be argumentative, and the complaint deficient in technical language." Applying this rule to the second count I think it makes out a good cause of action, and that proof of the facts stated in it will entitle the plaintiff to a verdict; which is really the true rule to determine the sufficiency of a complaint. In this count the pleader repeats the representations as stated in the first count, in which, among other things, it is alleged that the defendant represented that a company known as "The New York and Santa Fe Mining Company," was a duly organized company or corporation with an original capital stock of \$5,000,000, of the par value of \$100 per share. That said company had very valuable mines which it was then working; that the yield of its mines was of immense value; that said company would certainly pay quarterly dividends, in gold, of six per cent, and that the stock of the company was very hard and almost impossible to be obtained, it was so valuable. The complaint then

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alleges that the defendant then and there affirming and declaring to the plaintiff that he knew each and every one of the statements and representations therein set forth to be facts; then and there induced and advised the plaintiff to purchase of and through him, the said defendant, four hundred and eighty shares of the capital stock of the said company, which shares the plaintiff did then and there purchase through the said defendant, and paid therefore the sum of \$13,876.66. The said plaintiff then and there believing and confiding in each and all of the said statements and representations as above set forth to be true." The count then avers that each and every of said statements were and are false and untrue, and were fully known to said defendant to be false and untrue. These allegations, together, impute and imply a fraud purposely and intentionally committed by the defendant upon the plaintiff. The plaintiff, I think, could not be required to prove on the trial any thing more than the representations stated, the fact that the defendant at the time procured and induced him in reliance upon such representations to make the purchase of the stock as stated, and then to prove the utter falsity of such statements and representations, and that the defendant knew them to be false when he made them. This would make out a clear and complete cause of action, except proof of the damages. The case of *Addington v. Allen*, and most of the cases cited in the defendant's points, where the rule is held and stated "that the complaint in these cases should contain the averment that the representations were made with intent to deceive, were cases where the defendant was not the party benefited by the fraud or personally interested in the purchase or trade induced by such fraud. In *Addington v. Allen*, Addington represented one Baker to be good, and Allen sold Baker goods upon the faith of such representations. In *Zabriskie v. Smith*, Smith represented a merchant by the name of Walter H. Smith to the plaintiff

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to be good, and induced him to sell goods to said Walter H. on credit. It was properly a question in that case whether the representations were made with intent to deceive and defraud. And such must be the case whenever the representations are made to aid a third person, or to give him credit. The intent on the part of the person making the representations, in such cases, to give a false credit to such third person to enable him to deceive and defraud some other person is of the very essence and basis of the cause of action. The whole right of action in such cases depends upon such fact to be established; that the party making the representations made them knowing them to be false, and with intent to deceive and induce the person to whom they were addressed to part with his property to such third person on the faith of such representations. There is no fraud in such case, and no liability, unless there was this intent to deceive and defraud. But in this case the complaint states a palpable personal fraud committed by the defendant on the plaintiff for his own benefit, by which he obtained from the plaintiff at the time \$13,000 and upwards for stock in said mining company, which he then represented to be very valuable and worth par, and which the complaint alleges he knew at the time was utterly worthless. A bolder or grosser fraud could hardly be alleged, and it would be trifling with the course of justice to hold that a complete cause of action was not made out by proof of these facts: In the language of Judge Denio, in *Zabriskie v. Smith*, certainly the requisite allegation of an intent to deceive and defraud can be fairly gathered from all the averments in this count. An allegation of such intent is involved in the very statement of the facts of the trade. It is patent on the face of the transaction. It is no more necessary, in my opinion, to allege expressly that these statements and representations were made with intent to deceive and defraud the plaintiff, in such case than it would be in an

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action for assault are battery, if the defendant had knocked the plaintiff down at the time and destroyed one of his eyes or broke his nose, to aver that he struck such blow or blows with intent to injure the plaintiff. The facts stated in both cases involve an allegation of the requisite intent, to sustain the action. On the question of damages the plaintiff clearly, under this count, would be entitled to recover some damages. The representation was that the stock was very valuable and worth par. It is averred in this count that the said company, as also its property and stock, are of no value and in fact never was. This was clearly intended to be an averment that the stock never had any value, and was of no value at the time of the purchase of it by the plaintiff, and the plaintiff would be entitled to make such proof, under this averment. The words, *never was*, were clearly used to assert that the stock never was of any value, in the connection in which these words are used, and should be so interpreted; and the pleader further, in another part of the count, alleges that the said stock is of no use or value to the plaintiff, and that he has sustained great loss thereby, to wit, the full amount of \$14,838.50 so paid for said stock, with interest. In the averment following, that by means of the premises the said defendant had fraudulently deceived him, the plaintiff, and induced him to purchase said stock, the pleader intended to state and draw the general conclusions and averments of fraud and damages from the whole facts previously stated. In connection with the other allegations and averments it amounts, I think, to a sufficient averment of damage sustained by the plaintiff from the defendant's fraud, construed with that liberality which section 156 of the Code requires with a view to substantial justice.

The whole complaint is loosely drawn, and its statements are more or less wanting in logical and technical precision and explicitness, but in view of the liberal rules which we

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are required to apply in the construction of pleadings, I think the second count is sufficient, and the demurrer to that count should be overruled and the order appealed from so far reversed; but in respect to the first count the order should be affirmed, and the demurrer allowed to such count, with leave to the plaintiff to amend on payment of the costs of the demurrer, and to the defendant to answer over on payment of like costs. If the plaintiff elects to amend, and the defendant to answer over, neither party should have costs upon the demurrer, on appeal.

[MONROE GENERAL TERM, December 2, 1867. *J. C. Smith, Wallis and E. D. Smith, Justices.*]

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JOHN R. VANNORSDALL *et al.* vs. ISAAC VAN DEVENTER *et al.*

A testator, after directing the payment of his debts, by the second and third clauses of his will, gave to his wife all his personal property, and all his real estate during her lifetime. By the fourth, fifth and sixth clauses he gave and bequeathed to the "legal heirs" of his brother A., deceased, and to the "legal heirs" of his sister M., deceased, and to the "heirs" of his brother-in-law, W. V., all his real estate at the death of his (the testator's) wife "to be divided equally between each of the heirs above named," after the decease of his said wife. The testator died without issue, and his wife afterwards died. W. V. was still living. The testator's wife was a sister of W. V., the father of the defendants, and the latter, upon the death of their father, would be his heirs at law. In an action for the construction of such will; *Held* that the real estate mentioned in the will belonged to, and was owned in common by the parties to the suit, and that each of the twelve plaintiffs and the two defendants was entitled to one fourteenth thereof.

*Held, also*, that the intent of the testator was to give to his wife his real estate during her life, and after her decease to give the same in equal portions to the three classes of persons who should be heirs of his brother A., of his sister, M., and of his brother-in-law W. V.; the words "heirs," so far as related to the heirs of W. V., being used as synonymous with *children*; and in respect to the heirs of A. and M. there was no contingency in respect to the persons to take, and the estate would vest immediately upon the death of the testator.

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When a will recognizes the ancestor as living, and makes a devise to his heirs, *eo nomine*, this shows that the term is not used in its strict sense, but as meaning the heirs apparent of the ancestor named.

CASE submitted pursuant to section 372 of the Code of Procedure, for the purpose of obtaining a judicial construction of the last will and testament of Jacob Vannorsdall, and to arrive at the true intent and meaning of the testator, as to the disposition of his real estate.

The following facts were agreed upon by the parties :

On or about the tenth day of April, 1861, Jacob Vannorsdall, who was then a resident of the town of Mount Morris, Livingston county, died seised and possessed of certain real estate situated therein, and some personal property.

At the time of his death the said Jacob Vannorsdall left a last will and testament, by which he devised and directed as follows :

*“First.* I direct that all my just debts, including the expense of my interment and suitable tomb stones, be paid by my executors hereinafter named.

*Second.* I give and bequeath to my beloved wife, Elizabeth Vannorsdall, all my personal property, including all demands due to me from any person or persons after paying all debts which I am now owing, due or to become due, or any debts I may so owe at my decease.

*Third.* I give to my beloved wife, Elizabeth, all my real estate, viz. my farm, on which I reside, and my house and lot in the village of Tuscarora, during her lifetime.

*Fourth.* I give and bequeath to the legal heirs of my brother, Abram Vannorsdall, deceased,

*Fifth.* And the legal heirs of my sister, Maria Snyder, deceased,

*Sixth.* I give and bequeath to the heirs of my brother-in-law, William Van Deventer, all my real estate at the death of my wife, Elizabeth, to be divided equally between

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each of the heirs above named after the decease of my wife, Elizabeth Vannorsdall."

By the seventh clause, he appointed his wife, Elizabeth Vannorsdall and Asahel Northway, executors of his will, revoking all former wills.

After the death of the said Jacob Vannorsdall, the said will was duly admitted to probate by and before the surrogate of Livingston county, and letters testamentary were duly issued to the said Elizabeth Vannorsdall, as executrix, and Asahel Northway, executor, who immediately entered upon the discharge of their duties, and have fully completed and performed the same. After the death of the said Jacob Vannorsdall, the said Elizabeth Vannorsdall received, as legatee under said will, all the personal estate of the said testator, after the payment of his debts and funeral expenses; and she went into the possession of the said real estate and continued in possession of the same until her death. That on or about the 12th day of February, 1867, the said Elizabeth Vannorsdall departed this life. That said Jacob Vannorsdall died without issue. That the said Elizabeth Vannorsdall was a sister of Wm. Van Deventer, the father of the defendants. That the said Jacob Vannorsdall and William Van Deventer and these defendants had resided in Mount Morris, aforesaid, for a period of thirty years, and upwards, next prior to the death of said Jacob. That the said Abram Vannorsdall was a brother of the said Jacob, and that said Abram and his family had resided in the state of Ohio for a period of twelve years next prior to the death of said testator, and that the said Abram Vannorsdall was at the time of the making of said will deceased, and that since his death none of his heirs at law have resided in the state of New York. That the said Maria Snyder was a sister of the testator, and that she and her family had resided in the county of Ontario for twenty years and upwards next prior to her death, and her heirs have resided there since. That neither the said William

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Van Deventer or his wife were any blood relation of the said testator. That the following named persons are the children and only heirs of Abram Vannorsdall, deceased, viz: John R. Vannorsdall, Ellen V. Long, Cornelius Vannorsdall, Isaac Vannorsdall, James Vannorsdall, Garret Vannorsdall, Elizabeth Whitmore, Gilbert Vannorsdall, and Agnes Vannorsdall. And that Isaac Van Deventer and Elizabeth Post are the children of William Van Deventer, and at his death will be his heirs at law. That the following named persons are the children and the only legal heirs of the said Maria Snyder, deceased, viz: David Snyder, John B. Snyder and David Warren. That the plaintiffs herein are the only legal heirs of the said Jacob Vannorsdall, deceased. That the value of the said real estate herein described is about seven thousand dollars.

The plaintiffs claimed that in and by the said last will and testament the said real estate belongs to and is owned in common by the parties hereto, and that each of said parties is the owner of and entitled to one fourteenth of said real estate so mentioned and described in said will.

The defendants claimed that in and by said last will and testament they are entitled to and are the sole owners of the said real estate, and that the plaintiffs have no right, title or interest therein.

*McNeil Seymour*, for the plaintiffs. I. We claim that the testator, under the circumstances in which he was placed, performing almost his last act on earth, intended *something* by the fourth and fifth clauses of his will. And we say negatively, 1st. That he did not intend to make a senseless or meaningless parade of the names of his heirs at law. 2d. That he did not intend to merely trifle with their feelings.

II. The fourth, fifth and sixth clauses of the will are but one. By which the testator divides his estate per capita between the children of a deceased brother and sister, and



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the children of his brother-in-law, William Van Deventer.

1. Any other construction of the will would leave without meaning the clauses numbered fourth and fifth. 2. The direction in the sixth clause, "to be divided equally among *each* of the heirs *above named*," shows clearly that the testator had reference to the three sets of heirs named in the fourth, fifth and sixth clauses of the will, for to apply this direction of the testator to the words "the heirs," mentioned in the sixth clause, would not be only illogical but unnatural; if the estate were intended for the heirs of one person such direction was wholly unnecessary, for they would take per capita under the designation of "heirs of my brother-in-law," without further statements or directions as to division. If the testator intended, which we claim to be obvious, that his estate should be divided amongst the three sets of heirs, unless each set was composed of the same number, which practically would never happen, then to insure a per capita division, the words quoted in the sixth subdivision would be absolutely necessary. The word "each" in such quotation obviously refers to the three sets of heirs before named.

III. The external evidences of the intent of the testator are equally clear. 1. The plaintiffs in this action are the only heirs at law of the testator. 2. The defendants are the children of his wife's brother, living with their father, having no other relation whatever to the testator. The heirs of Abram Vannorsdall numbered nine. Those of Maria Snyder numbered three. And the children of said William Van Deventer numbered two, showing the necessity for a per capita division of the property, for the direction given by the testator, is, "to be divided equally among each of the heirs above named." 4. To apply this quotation to the children of William Van Deventer alone, appears the more absurd upon the development of the facts that he had but two children, while the unequal number of the three sets of heirs would seem to make it certain

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beyond controversy, that in the testator's own mind he embraced them all in the words, "equally between each of the heirs above named," and the last four words of this quotation would seem to demonstrate in addition to the considerations above suggested that the testator had reference to the three sets of heirs, all named in the preceding half dozen lines of the will. 5. The fact that his only heirs at law lived in the county of Ontario, in this state, and in the state of Ohio, offers no possible reason for changing the obvious intention of the will, for distant relatives are not unfrequently remembered with kindness, while those nearer by, are sometimes the occasion of dissension. But whatever the ingenuity of counsel may suggest on this point, in the absence of any reason but this simple fact, it is certainly enough that the testator does *give* to these "strangers to his blood" the same proportion of his estate that he does to those who are his heirs at law. The ties of consanguinity are not so easily severed, by state or county lines, particularly in a case where the only sister of the testator resided in an adjoining county and his only brother had removed from his neighborhood only twelve years before the death of the testator. These heirs at law might complain of the proximity of these strangers to the testator; that perhaps undue influence may have been used to induce the testator to make any devise to these defendants, and this, it seems, can be the only argument to be deduced from the relative location of these parties at the time of the making of this will. 6. The state of facts agreed upon between the parties, and as presented by the case herein, precludes all idea of any reason in the mind of the testator for disinheriting his heirs at law; no prejudice, disagreement or other cause is pretended.

IV. It is a well established rule of law that such construction should be put upon a will as will give effect to all its provisions. And, other things being equal, that

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construction should be sustained which favors those who would be the natural recipients of his bounty; therefore, if in this case the court should find the arguments in favor of the construction put upon the will by the plaintiffs, and those of the defendants equally balanced, it would be the duty of the court to decide in favor of the plaintiffs. (*Redfield on Wills*, 445, § 2. *Areson v. Areson*, 3 *Denio*, 460, 461.)

V. It has been often held that where the intention of the testator is apparent upon the whole will taken together, the court must give such a construction as will support the intent, even against strict grammatical construction of the words. And, to effect this, words and limitations may be transposed, supplied or rejected. (*Pond v. Bergh*, 10 *Paige*, 140.) As to giving effect to every part of the will, see *Christie v. Phyfe*, (19 *N. Y. Rep.* 348.) Also cases cited in *5th Abbott's Digest*, p. 382, *subd.* 240, 241. *Redfield on Wills*, p. 452, § 15.

VI. The court should surround itself with all the material facts and circumstances which surrounded the testator at the time of the making of this will, and occupy as nearly as possible his position. (*Blossom v. Griffin*, 13 *N. Y. Rep.* 575, 576.)

VII. The devise to the heirs of William Van Deventer is void. William Van Deventer, at the time of the making of the will, was and is still living. A general devise to the heirs of a living person but not referred to in the will as such, is void. (*Heard v. Horton*, 1 *Denio*, 165.)

The principle involved in the maxim "*nemo est hæres viventis*" should be applied with strictness to this case.

*T. R. Strong*, for the defendants. I. The question presented is, whether the plaintiffs, part of whom are the legal heirs of Abram Vannorsdall, deceased, and the others the legal heirs of Maria Snyder, deceased, under the will of Jacob Vannorsdall, take an interest as devisees in the real estate devised.

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II. The decision of this question must turn wholly upon the construction which shall be given by the court to the language of the will, as to the intention of the testator to devise them an interest. Mere conjecture as to his intention; any views as to what would have been proper, cannot be regarded; the language of the will must clearly express, or import, an intention to give them an interest, or they take none under the will. (*Hyatt v. Pugsley*, 23 Barb. 285. *Bunner v. Storm*, 1 Sandf. Ch. 357, and cases cited. *Mann v. Mann*, 14 John. 1.)

III. The language of the will does not express, or import, an intention of the testator to devise to the plaintiffs an interest in the real estate, and a construction of the will, finding such an intention, would be wholly unwarranted. By the third clause of the will, the testator gives to his wife Elizabeth, "*all my real estate, viz. my farm on which I reside, and my house and lot in the vantage of Tuscarora, during her lifetime.*" By the fourth and fifth clauses, the testator expresses: "Fourth, I give and bequeath to the legal heirs of my brother, Abram Vannorsdall, deceased; Fifth, and the legal heirs of my sister Maria Snyder, deceased." This is the whole of the fourth and fifth clauses. No *subject* of gift is mentioned, or referred to, in them. Those clauses must, therefore, necessarily fail of operation, as incomplete in not designating, or indicating any subject, leaving the intention, or mind, of the testator, in that respect, wholly unexpressed and undiscoverable, unless the defect is supplied in some other part of the will. There is nothing in the previous parts of the will, which affords any light as to *what* the testator intended to give to the heirs of his brother Abram, or the heirs of his sister Maria, and if the will contains any evidence on that subject, it is to be found in the sixth clause, which is in these words: "Sixth, I give and bequeath to the heirs of my brother-in-law, William Van Deventer, *all my real estate at the death of my wife, Elizabeth*, to be divided equally between each

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of the heirs above named, after the decease of my wife Elizabeth Vannorsdall." It will be observed that this clause is complete of itself, and independent of all others, and that it is perfectly clear and unambiguous. It gives to the heirs of the testator's brother-in-law, William Van Deventer, "*all my real estate at the death of my wife, Elizabeth.*" He had by the previous third clause given *all* his real estate to *his wife for life*, and then he adds, "to be divided equally between each of the heirs above named, after the decease of my wife, Elizabeth Vannorsdall." Who are intended by the "heirs above named," in the sixth clause? Are the heirs mentioned in the fourth and fifth clauses, as well as in the sixth clause, included in that phrase? The answer is obvious; the sixth clause is independent of the fourth and fifth clauses; it disposes of *all* the real estate left undisposed of by the third clause, leaving none for the fourth and fifth to operate upon, thereby proving that the fourth and fifth were not intended to embrace it; and then provides for a division, after the death of the wife, equally between each of the heirs above named, referring, manifestly, to those heirs to whom by the previous part of the clause it was given, for it could be divided between no other than the owners. This shows there is no ground for even a reasonable conjecture, that the testator in the sixth clause referred to any other heirs than the heirs of William Van Deventer. (*See Hyatt v. Pugley*, 23 Barb. 285.) A construction which would make the words "heirs above named," include all the heirs in the fourth, fifth and sixth clauses, would defeat the devise in the sixth clause as a devise of *all* the real estate to the heirs of William Van Deventer, at the death of his wife Elizabeth, or make the clause repugnant to itself. While in the former part of the clause the devise is in terms to the heirs of William Van Deventer of "*all my real estate,*" &c. that construction would make the division among, not

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only those heirs, but also the heirs named in the two preceding clauses.

IV. William Van Deventer being alive, the word "heirs" in the sixth clause of the will, imports his children. (*Heard v. Horton*, 1 *Denio*, 168.) *Campbell v. Rawdon*, 18 *N. Y. Rep.* 416.)

V. The defendants are entitled to judgment that they are the sole owners of the said real estate; and that the plaintiffs have no right, title or interest therein.

*By the Court*, E. DARWIN SMITH, J. The construction of the will of Jacob Vannorsdall, deceased, which the plaintiffs in this submission claim, I think, is the true one. The case states that the plaintiffs claim that in and by the said last will and testament, the real estate mentioned in said will belongs to, and is owned in common by, the said parties thereto, and that each of said parties is the owner of, and entitled to, one fourteenth of said real estate so mentioned and described in said will. The claim of the defendants that in and by said last will and testament they are entitled to, and are the sole owners of, said real estate, and that the plaintiffs have no right, title or interest therein, is, I think, unsound and untenable. The intent of the testator was, I think, very clearly, to give to his wife his real estate during her life, and after her decease to give the same in equal portions to the three classes of persons who should be heirs of his brother Abram, of his sister Maria Snyder, and of his brother-in-law William Van Deventer. The word *heirs*, as used in this will, so far as relates to the heirs of his brother-in-law, Van Deventer, was doubtless used as synonymous with the word *children*, for the will assumes that he was then living, while in respect to his brother Abram and his sister, Maria Snyder, it speaks of them as deceased. In respect to the heirs of his brother and sister there was no contingency in respect to the persons to take, and the estate would vest immedi-

ately upon the decease of the testator. Assuming that the testator meant to give the third interest in the estate to the children of his brother-in-law, Van Deventer, there could be no contingency at the time of the death, and the estate would vest in the children of the defendant Van Deventer, then living, immediately. When a will recognizes the ancestor as living and makes a devise to his heirs, *eo nomine*, this shows that the term is not used in its strict sense, but as meaning the heirs apparent of the ancestor named. (*Heard v. Horton*, 1 *Denio*, 168. *Campbell v. Rawdon*, 18 *N. Y. Rep.* 418.) To give this will the construction claimed by the defendants and give them the whole estate, would clearly defeat the intent of the testator. In drawing this will, the draftsman obviously meant to classify the devises under the will according to their families. The numbering employed in the will denotes this. *First*, the will provides for the payment of the debts of the testator. *Second*, it gives the personal estate to the wife. *Third*, it gives her the real estate for life. *Fourth*, it gives and bequeaths to the legal heirs of his brother Abram. *Fifth*, to the legal heirs of his sister Maria. *Sixth*, to the heirs of his brother-in-law, William Van Deventer, all his real estate at the death of his wife Elizabeth, to be divided equally between each of the heirs above named, after the decease of his said wife. The "heirs" above named means the heirs named in the divisions numbered 4th, 5th and 6th. The property given is suspended in the two former classes, so that it may be mentioned and described with its incidents only once. Nothing, otherwise, is given to the heirs named in numbers 4 and 5, and those provisions would be entirely inoperative and surplusage. These two classes were named in the will for some purpose, and we must so construe the will as to give operation and effect to every part of it if possible. The repetition of the words, "I give and bequeath" in the 6th subdivision is simply surplusage or

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repetition, without meaning or necessity, inserted by the draftsman without considering that words sufficient to devise the estate were contained in the 4th division evidently to apply to what should come after it. This was obviously overlooked by the draftsman, as he turned over the sheet in writing the will which was exhibited to us on the argument. There can be, we think, no doubt what the real intent of the testator was, in making this will, and that must control, however inartificially the will may be drawn or worded.

Judgment should be given in conformity with these views, declaring that each of the parties has an equal interest of one fourteenth of the estate.

Judgment accordingly.

[MONROE GENERAL TERM, December 2, 1867. *J. C. Smith, Welles and E. D. Smith, Justices.*

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TITSWORTH vs. WINNEGAR.

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Warehousemen are bound, like all bailees who receive a benefit from the bailment of goods, to exercise ordinary care and diligence, and are responsible only for ordinary neglect.

The basis of the claim against a warehouseman for neglect in the care of goods, is that he is in possession of the goods as a depositary for hire. It is in respect to this right to receive compensation for storage, that he is liable for injury to the goods, or their loss in consequence of, or arising from, his neglect.

A carrier of goods by canal, when within about a mile and a half of the place of delivery, with the goods, presented the bill of lading to the warehouseman to whose care the goods were consigned, and informed him that his boat could proceed no further, on account of the ice in the canal, and requested the warehouseman to pay his charges for freight. The latter thereupon paid such charges, and gave a receipt on the shipping bill, for the goods, and the boat was left in the charge of a third person. Subsequently the owner paid the warehouseman his charges on the property, and his advances to the carrier for freight. The goods while remaining on the boat, were



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damaged by water. *Held*, that when the warehouseman's charges and advances for freight were paid by the owner, the latter was entitled to take immediate possession and control of the goods, and they were not, after that time, subject to any lien or claim of the warehouseman for storage, or other services, nor was he liable for any loss or damage happening to such goods.

*Held, also*, that there was no consideration for any contract by the warehouseman to take care of the goods, and none could be implied. That there was no duty, on his part, to take care of the property, because there was no assumpsit to pay for such care, and no lien in his favor could exist upon property remaining in the possession of the carrier.

ON the 28th day of November, 1861, the plaintiff shipped at Syracuse, N. Y. on board a canal boat, a quantity of salt in bags and barrels, consigned to J. E. & M. Titworth, Mount Morris, to the care of the defendant, who was at the time a warehouseman at Mount Morris. The captain of the boat carried the salt as far as a place called Ayrault's landing, where the boat was frozen in the canal by the ice, and it became impossible to go farther until the opening of navigation in the spring. The captain of the boat called on the defendant and stated to him that he had the salt on board of the boat, one and a half miles from Mount Morris, and could not get any further. The defendant then paid the captain his charges, and gave a receipt on the shipping bill, as follows: "Received and paid. Charged Dec. 3, 1861. 300 bgs. 14 lb. sacks, 22 bgs. 56 lb. coarse sacks, 3 left in boat. 300 bls. left in boat not counted." Which charges the plaintiff afterwards repaid to the defendant, with the cartage from the boat to the warehouse. The salt was never delivered at the warehouse of the defendant in Mount Morris, nor nearer than one and one half miles from said warehouse; and soon after the receipt was given, the salt was damaged on board of the boat, by water. The plaintiff brought an action before a justice of the peace, and recovered a judgment for \$200 damages, besides costs. The defendant appealed to the county court of Livingston county. On the trial in that court, at the close of the plaintiffs' testi-

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mony, the defendant moved the court for a nonsuit on the grounds: 1st. That the defendant did not assume the control of the salt as warehouseman. 2d. That the carrier had not performed his contract, and was not discharged from his contract by the defendant's receipt, but was still liable; which motion was denied by the court, to which ruling and decision of the court, the defendant excepted.

The court charged the jury:

1st. That taking charge of a part of the consigned goods and paying charges on the whole made him, the defendant, responsible as warehouseman for the whole property, and he was bound to exercise in regard to it such care as a prudent man would do in regard to his own property.

2d. That a loss having been shown, it was for the defendant to show that it did not occur through his negligence.

3d. That the consignment to him of the goods was a request to take care of them as warehouseman, and gave him a right to collect compensation for his services.

4th. That the taking charge of the goods at the point where they were left, fixed his responsibility, the same as if they had been delivered at his warehouse, and that the receipt given by him for the goods, discharged the carrier.

To the above charge, and to each and every proposition so submitted, the defendant excepted.

The defendant then requested the court to charge the jury that the defendant, not having the property at the place of destination, and not having received any instructions in reference to it, was not liable as a warehouseman. The court refused so to charge, to which the defendant excepted.

The defendant also asked the court to charge the jury that he, the defendant, not making any charge for storage, and not being entitled to make any charge for storage, he was not liable for damages. The court refused to so

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charge, to which decision and refusal the defendant excepted.

The defendant further asked the court to charge the jury that if they believed that when the defendant gave the receipt he gave it at the request of Donnelly, (the captain of the boat,) and with the understanding that the salt would be safe on the boat until they could advise the plaintiff of its condition, the defendant was not liable as warehouseman. The court refused so to charge; to which decision and refusal the defendant excepted.

The defendant further asked the court to charge the jury that having receipted the salt "on the boat," and not having undertaken any charge of it, or agreed to do any thing with it, the defendant was not liable. It was the same as though the defendant had receipted the property from the plaintiff himself, instead of receiving it from the carrier, who was the plaintiff's agent. The court refused to so charge the said jury, but instructed them that if they found that no damages occurred to the salt after the plaintiff had seen the salt on the boat, and paid the charges, the jury might consider such inspection and payment as evidence tending to show the plaintiff's satisfaction with the mode of storage, and if they found he had ratified, the defendant would not be liable; and the defendant excepted to the said refusal to charge as aforesaid.

The jury found a verdict in favor of the plaintiff for \$200 damages; and from the judgment entered thereon, the defendant appealed to this court.

*McNeil Seymour*, for the appellant. I. The plaintiff should have been non-suited upon the trial, for the reasons stated. No cause of action had been made out by the plaintiff. The plaintiff had made no contract with the defendant in relation to the salt. The salt in question had been delivered to the captain of the boat, by him to

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be conveyed to the village of Mount Morris and left in the care of the defendant, at Mount Morris. The agreement was made by the plaintiff with the captain, without any limit as to the liability of the captain. The defendant had no authority and no power to alter, change or qualify this agreement, or release the carrier from its strict performance. Aside from the act of the plaintiff, the carrier could not be released or excused from the non-performance of his contract, except by the interposition of the "vis major." The freezing of the boat in the canal at a distance of twenty, or even ten miles from Mount Morris, might be such an interposition, but still the liability of the carrier would continue, and it would then become his duty to take care of the salt and complete his contract as early as possible. (*Bowman v. A. T. & E. M. Teall*, 23 Wend. 306.) But in the case at bar he was not released from complying with his contract, during even the suspension of navigation. The boat was detained by the ice within a mile and a half of its destination. The contract was made on the 28th November; the carrier assumed to deliver the salt notwithstanding the risk of the season; the chances of being frozen in by the ice, &c. If under these circumstances he could have substantially complied with his contract, or in any way have delivered the salt in Mount Morris, he was bound so to do. The rule as adopted by the Court of Appeals is, "That the non-performance of a contract by a common carrier is not excused by the act of God, where it may be substantially carried into effect, although the act of God makes a literal and precise performance of it impossible." (*Williams v. Vanderbilt*, 28 N. Y. Rep. 217.) The carrier is bound to deliver goods entrusted to him to the place where they are addressed, and if he delivers them elsewhere an action lies against him. (*Stephenson v. Hart*, 4 Bing. 476.) The carrier is liable until the goods are delivered and received by the consignee. (*Goold v. Chapin*, 20 N. Y. Rep. 259.

*McDonald v. The Western Railroad Corporation*, 34 N. Y. Rep. 497.)

II. The carrier not having been discharged, could any act of the defendant release him from full performance? The defendant is sought to be charged in this action as a warehouseman; he could have, therefore, such authority and power, only, over the property as a warehouseman could have; this authority and power does not include the right to release the carrier from the performance of his contract. The liability of the warehouseman could not commence until the liability of the common carrier had ceased. Both cannot, at the same time, be responsible. The liability of the one implies the freedom from liability of the other. Suppose Donnelly had chosen to leave the salt in care of another person living near where the boat was left, and this person had given just such a receipt as that given by the defendant; can it be pretended that this receptor would be liable to the plaintiff at all? Much more that he would be liable as a warehouseman. He takes charge of the salt where it is, *on the boat*, and undertakes to do nothing more than that it shall receive no injury further than may come from the situation in which it is left. He would not be liable to the plaintiff at all; for there would be no privity of contract. He could only be made liable to the carrier for what he agreed to do. The fact that the defendant, who keeps a warehouse in Mount Morris, gave the receipt in question, does not change the principle. The receipt is not a warehouseman's receipt. "A warehouseman is a person who receives goods and merchandise to be stored in his warehouse for hire." (1 *Bouv. Inst.* 406, § 1011.) "His liability commences as soon as the goods arrive, and he applies the crane to take them into his warehouse." (*Id.*)

Had the plaintiff brought this action against the carrier, can it be pretended that this receipt would have been a defense for him? Certainly not. (*Bowman v. Teall*, *above re-*

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*ferred to.*) If the warehouseman can discharge the carrier from the performance of his contract by a receipt like the one in this case, then one common carrier can release another from the performance of his contract made with other persons.

As the act of the defendant did not and could not discharge the carrier, and as his conduct in relation to the property was free from blame, and as he made no contract, neither intended to make any, charging himself with the care of the salt, how can the plaintiff maintain this action? The principle of adoption has no application to this case, for there can be no pretense that the defendant assumed to act as a common carrier, nor does the plaintiff by this action seek to charge him as such. The complaint makes him a *warehouseman*, and charges him only with a warehouseman's liability.

III. By the terms of this receipt given by the defendant, he clearly intended to limit, and did limit, his liability. He does not give the usual warehouseman's receipt; does not describe the property or count it; but receives it "on board of the boat not counted," and so expresses himself in the receipt. Suppose, under such circumstances as attend the case, the plaintiff refusing to pay storage, the defendant commences an action therefor, could not the plaintiff justly answer, that the defendant did not store the salt at all, that it was still on the carrier's vessel, and the carrier's contract was unperformed? By the receipt given, the defendant clearly intended to assume no liability or responsibility in regard to the salt. He is not bound to remove the salt from the boat, or draw it from the boat to Mount Morris, or do any other act or thing in relation to it except to leave it on board of the boat. He cannot in any manner be an insurer of the property.

IV. Removing a portion of the salt from the boat to the defendant's warehouse did not make the defendant

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liable for what was not removed. If the propositions already made are correct, this will follow as a corollary.

V. Nor does the payment of the freight by the defendant to the carrier in any manner affect the question. The carrier had not performed his contract, as we have shown, and was not entitled to the freight. The payment was voluntary by the defendant and he could never have recovered it from the plaintiff; if otherwise, such payment could not alter facts; it would be strange indeed if the defendant's attempt to oblige the plaintiff should be so construed as to make a canal boat a warehouse, and the defendant liable for its improper construction for such purposes; or, if a warehouse, that the defendant's receipt made him liable to remove the salt therefrom to some other place or to the bank of the canal.

*Vanderlip & Smith*, for the respondent. I. The payment of the charges of the carrier by the defendant, the taking a part of the goods consigned, and receipting for the whole, made him liable as a warehouseman. Leaving part on the boat did not relieve him from responsibility, but made him responsible for the safety of the boat as a place of storage. If the captain did agree to take care of the salt, he then became the agent of the defendant, his duty and responsibility as a carrier having ceased when the consignee receipted the bill of lading.

II. The defendant is estopped from denying his liability as a warehouseman. He paid the charges on all the property, gave the plaintiff notice that the salt was there, and that he had paid the charges, and demanded their repayment. When the plaintiff came to his warehouse and went to look at the salt, he did not inform the plaintiff that there had been water in the boat, although he knew the fact, but demanded and received his charges, including pay for carting a portion of the salt from the boat to his warehouse. The plaintiff acted upon this state of facts,

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by paying the entire bill. It makes no difference that the defendant made no charge for storage. He was entitled to demand it and could have collected it.

III. A warehouseman is bound to use such care in relation to property entrusted to him, as a prudent man would exercise in relation to his own property. (*Platt v. Hibbard*, 7 Conn. Rep. 497. *Knapp v. Curtis*, 9 Wend. 60. *Schmidt v. Blood*, Id. 268. *Powers v. Mitchell*, 3 Hill, 545. *Arent v. Squire*, 1 Daly, 347.) Here the property was left upon an old boat that was leaky, and with no one left in charge of the salt, the water remaining in the canal for a week or ten days after the receipt of the property; and the only evidence upon the point of want of care is that of the captain as to the condition of the boat, and of the plaintiff that it was not prudent to leave it there. This testimony was not disputed.

The court was right, therefore, in refusing to nonsuit the plaintiff, and the exceptions to his charge, and to his refusal to charge as requested by the defendant, were not well taken.

*By the Court*, E. DARWIN SMITH, J. The defendant is sued as a warehouseman. Warehousemen are bound, like all bailees who receive a benefit from the bailment of goods, to exercise ordinary care and diligence, and are responsible only for ordinary neglect. The salt, for the loss of which the defendant is sued, was confessedly never received by the defendant at his warehouse, never was in his warehouse, or stored by him in any buildings or place provided by him for the receipt and storage of property. The consignment of it by the bill of lading was a request to him to receive it in store for the owner, at his place of business at Mount Morris, where it was the duty of the carrier to deliver it. When the captain of the canal boat, in charge of the salt, presented to the defendant the bill of lading and informed him that his boat had arrived within about a mile and a half of Mount Morris



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and could come no further, for the ice in the canal; and requested the defendant to pay his charges for the freight, the defendant was under no obligations to receive the property or pay such charges. The receipt indorsed on the bill of lading, and the other proofs, show that he did, however, so far receive the salt where it was, as to take possession of the bags of salt and remove them from the boat to his warehouse and pay the captain's bill for the freight of the whole quantity of salt, leaving in the boat the three bags and three hundred barrels of salt, not counted, as the receipt states. By reason of the consignment to him in the bill of lading of the salt, the receipt and removal of a part of it to his warehouse and the payment of the whole freight to the captain, upon his avowal that he wanted to go home and should leave his boat there with the salt in it until spring, I think the defendant so far acquired a special interest in, or lien upon all of the said salt, that if nothing else appeared he might perhaps be deemed to have possession and control of the same, after the captain left the boat, so far as to be responsible for that degree of care in respect thereto, which warehousemen or depositaries for hire are bound to exercise over property in their possession. But when the plaintiff himself came to Mount Morris and found the three hundred barrels of salt remaining aboard the canal boat, where it was left by the carrier, and after having seen it and found it was all right, paid the defendant his charges in respect to the salt received, and his advances of freight to the captain, the condition of things was entirely changed. The defendant's lien upon the property for his advances to the captain was then discharged. The plaintiff, as owner of the property, was then entitled to take immediate possession and control of the property. It was not, after that time, subject to any lien or claim of the defendant for storage or other services. It was not in his custody, or possession, or care, so as to entitle him to make any charge

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in respect to it for storage or otherwise. The boat in which this salt was then remaining belonged to the carrier who had not fully discharged his duty in respect to said salt. It would have been his duty on the opening of navigation in the spring, as soon as he was able to do so, to transport the said salt to its original destination at Mount Morris and deliver it, in fact, to the defendant at his warehouse. For this service he had been paid. The defendant did not hire this boat for the winter for the storage of the salt, or acquire in any way, that I can see, any control or possession of it for the storage of said salt during the winter or otherwise. The account between him and the plaintiff was closed in respect to said salt when the latter paid his charges in respect to it, in full. The boat captain testified that he could not get to Mount Morris with his boat, because the canal was frozen. The canal boat was not left in charge of the defendant, but the captain testified that he left it in charge of a man named Frettenburgh, who lived on the opposite side of the river from Mount Morris. The defendant therefore had no possession of, or control of, the boat during the winter. The basis of the claim against a warehouseman for neglect in the care of goods is that he is in possession of the goods as a depositary for hire. It is in respect to this right to receive compensation for storage that he is liable for injury to the goods, or their loss, in consequence of, or arising from his neglect. Here there was no such right. No storage was paid to or claimed by the defendant for the salt remaining in the boat, and none could legally be demanded or recovered by the defendant. The liability of warehousemen rests upon contract implied in law. Here there is no consideration for any contract to take care of this salt, and none can be implied. There was no duty to take care of the salt, because there was no assumpsit to pay for such care, and no lien could exist upon property remaining in the possession of the carrier.

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If these views are correct, the defendant is in no way responsible for the loss of or injury to the salt in question, and several of the exceptions taken to the charge of the judge, and to his refusals to charge as requested, are well taken, and the judgment should be reversed and a new trial granted in the court below, with costs to abide the event.

Judgment reversed.

[MONROE GENERAL TERM, December 2, 1867. *J. C. Smith, Wallis and E. D. Smith, Justices.*]

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THE UNION BANK, IN THE CITY OF NEW YORK *vs.* THE  
MAYOR, &c. OF THE CITY OF NEW YORK.

A competent authority, having jurisdiction over the subject of assessment for purposes of taxation, and over the plaintiffs' property, assessed the plaintiffs for personal property. The plaintiffs complained and applied to the courts for redress. Before the final decision in the Court of Appeals, the officer having charge of the collection of taxes gave a notice to the plaintiffs, requiring payment, and stating that in the event of non-payment, a warrant would be issued, to collect the same. The plaintiffs then paid the assessment. There being no warrant, no seizure, no threatened seizure, no payment of money to free its property from the possession of another, no ignorance of facts; *Held* that this was a purely voluntary payment, and no action would lie to recover the same back.

Nor can such an action be maintained against the city corporation of New York, even if the payment be coercive, taxes being levied and collected under state authority, and the money collected being finally applied by state law.

**A**PPEAL from a judgment rendered at a special term, sustaining a demurrer to the complaint upon the ground that it did not state facts sufficient to constitute a cause of action. The action was brought to recover the sum of \$21,916.81, that being the amount of a tax assessed

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against the plaintiffs in the year 1862. The plaintiffs claimed exemption from taxation on the ground that their capital stock, upon which the assessment was made, was invested in the stocks of the United States. The plaintiffs' claim of exemption was overruled by the tax commissioners, and thereupon they obtained a writ of certiorari under section 20, of the Laws of 1859, to review the decision of the commissioners in that regard. The Supreme Court, at general term, modified the assessment of the plaintiffs by deducting the sum of \$25,000 from the amount upon which they had been assessed. The plaintiffs appealed from this decision to the Court of Appeals, claiming that they could not be legally assessed upon any portion of their capital stock. Pending the appeal to the Court of Appeals, the receiver of taxes served a notice upon the plaintiffs, that unless the tax assessed against them was paid, a penalty by way of interest would be imposed, and a warrant issued for the collection of the tax and interest. The plaintiffs thereupon paid the amount of tax to the receiver of taxes, and brought the present action against the city corporation to recover it back.

*W. Howard Wait and Pierpont Isham*, for the appellants.

I. The plaintiffs claim the right to recover the money, as it was taken under those circumstances which the law pronounces compulsory, and to which the defendants have no claim, after the reversal of the judgment of the Supreme Court and the adjudication of the commissioners of taxes and assessments, whereby the assessment and tax were declared illegal and void. It was not a *voluntary payment*, nor made on a *compromise of a disputed right*. 1. The general rule, which in some instances has been applied to the payment of taxes, is not questioned: "That where there is *bona fides*, and money is voluntarily paid, with full knowledge of all the facts, though there be no debt, still it cannot be recovered back." There must be "*good faith*"

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to make a voluntary payment binding; for if the party knew the claim was groundless, it is a fraud, and the money may be recovered back. (*Duke de Cadaval v. Collins*, 4 Ad. & Ellis, 858.) So if the parties acted under a mutual mistake of facts, the money may be recovered. (*Mowatt v. Wright*, 1 Wend. 355, 362.) It is obvious, however, the application of that general rule to this case decides nothing; it furnishes no aid in coming to a proper result; for the question still remains, when is the payment voluntary? and under what circumstances does the law say it is compulsory and taking an undue advantage of a party's situation? Upon these inquiries, the case, to a great extent, depends. In the case of *Kelly v. Solari*, (9 M. & Wels. 54,) Baron Parke has given the application of that rule in definite language. He says: "*If the money was paid intentionally, without reference to the truth or falsehood of the fact, the plaintiff meaning to waive all inquiry into it, and that the person receiving shall have the money at all events, whether the fact be true or false, the latter is entitled to retain it.*" The same rule applies in equity. (3 Lead. Cas. in Eq. 425.) It is a question of intention, and whatever that is, the court will carry into effect, in this, as in all other contracts and dealings of parties. In all cases of voluntary payments, or of payments in compromise of matters in dispute, a final compromise is intended by the party paying and the party receiving the money; a waiver and abandonment of the controversy, and of the rights and claims growing out of it, and it is a bar to any subsequent litigation of the matter. If the payment in this case was voluntary, it would have arrested the further proceedings on the *certiorari*, in the appeal from the Supreme Court to the Court of Appeals. That such was not the intention or understanding of either of the parties is evidenced by the fact that, after the money had been received, both parties continued that litigation until the assessment

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was set aside and declared illegal and void. 2. The facts on which this money was paid and received are stated in the complaint, and by the demurrer are admitted to be true. It is believed that not one element exists which brings this case within the application of voluntary payments. The commissioners of taxes and assessments for the year 1862 assessed the plaintiffs on their United States bonds and other like securities which they held as capital, in the sum of \$1,288,624, and contrary to repeated objections and denials of their right and authority so to do, entered that amount on their "annual records." On the removal of those proceedings to the Supreme Court "for revision and correction," the adjudication of the commissioners of taxes, with some modification, was affirmed, and the amount of the assessment on that property was fixed at \$1,263,654, which was the amount on which the tax was finally made. From that judgment the plaintiffs appealed to the Court of Appeals. The appeal did not suspend the power of the commissioners of taxes, nor that of the receiver of taxes to enforce the payment of the tax on that assessment when corrected in conformity with the judgment of the Supreme Court.

The adjudication of the commissioners of taxes, and of the Supreme Court on that assessment were judicial acts, and unappealed from were conclusive in fixing the amount of the assessment and tax against the plaintiffs. (*Vose v. Willard*, 47 Barb. 320.) When the assessment roll was perfected and passed into the hands of the receiver of taxes, it had the character and conclusiveness of a judgment, upon which a warrant or final process, like an execution upon a judgment, could issue to enforce its collection and payment. The receiver of taxes, who alone, as the proper officer of this municipal corporation, had the power to enforce the payment of that tax, and take the required steps for that purpose, caused notices to be given, that unless the tax was paid, the penalty authorized by the

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act would be imposed, and a warrant issued for the payment of the penalty and tax, and the plaintiffs' property seized and applied for its payment. These notices, the defendants claim, were but mere demands or requests for the payment of the tax, and do not destroy the voluntariness of the payment. It is true, they were demands for that payment, and by the only person authorized to make and enforce them; and they are something more; they were coercive steps, and under the statute were necessary to lay the foundation for issuing the warrant and making a levy upon the plaintiffs' property. Without those notices no warrant could have been issued. As coercive measures, they have the same character and importance as making the assessment itself, and issuing the warrant. It is further stated and admitted, that these plaintiffs, by the judgment aforesaid, by the threats and statements of the receiver, and by the fear that the amount of the tax and penalty would be collected by the defendants and their agents, and the property of the plaintiffs taken and sacrificed therefor, were compelled and forced to relinquish the money to the amount of that tax, which was received, and has ever since been retained by the defendants.

In determining from these facts, whether this was a voluntary payment or not, we have only to apply the legal test as given by Baron Parke. (9 *M. & Wels.* 54.) Was the money intentionally paid without reference to the fact whether they were liable for that tax or not? Did the plaintiffs, in yielding up that money, waive all inquiry as to the fact of their liability for that tax, when at that time and during the whole period, they were prosecuting their suit, and resisting their liability in all the courts, from the adjudication of the tax commissioners to the Court of Appeals? Did the plaintiffs intend that the corporation should have that money at all events, whether they were liable upon that tax or not? It would seem that the mere statement of facts as they are admitted to be true, carries

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with it the answer, that no voluntary payment or compromise was intended by the plaintiffs, or so understood by the defendants; and that no such legal result can follow, in the application of the rule as given by Baron Parke.

3. It is not necessary to render the payment of money compulsory or involuntary, that there should be a forcible resistance, nor that the party should remain passive and permit a levy and sale of his property on the warrant. It is sufficient that the money is paid *reluctantly in consequence of an illegal demand, and to protect his property from a levy and sale*. In *Maxwell v. Griswold*, (10 How. U. S. 241,) the court observed that: "In order to constitute an involuntary payment so that the money may be recovered back, it need not be made under actual violence or physical force; it is enough that the party *pays reluctantly* in consequence of an illegal demand, and without being able to regain possession of his property except by submitting to the payment." The principle is the same, if the money is paid to enable the owner to retain the possession of his property, for the object in getting it is to retain it for use. The same general principle is sustained in *Am. Ex. Ins. Co. v. Britton*, (8 Bosw. 148.) In *Boston Glass Co. v. Boston*, (4 Metc. 181,) it was held that payment of taxes to a collector *who had a tax bill and warrant* in the form prescribed by law, is to be regarded as a *compulsory payment*, and if such taxes were assessed without authority, they may be recovered, although the party made no protest before payment. The obvious reason of the rule is clearly stated in *Preston v. Boston*, (12 Pick. 7.) It arises from the power and authority placed in the hands of a collector of taxes by virtue of his warrant to levy directly upon the property \* \* in default of the payment of the taxes. Such warrant is in the nature of an execution. \* \* \* Such being the state of the case, the payments made to a collector of taxes may be considered compulsory, and made under such circumstances as will authorize the party giving the money



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to recover back the same if the tax was illegally assessed. The case in 12 *Pick.* 7 is very similar to this. In that case, as in this, the assessment had been perfected, and it, with a warrant, had been placed in the hands of a collector. In that case, as in this, the collector notified the party of the tax, and stated that unless the tax was paid the warrant would be duly levied. Was the party bound in that case to make resistance to its collection, or was he under obligation to remain passive, and witness the levy of the warrant and the sacrifice of his property on its sale, or having objected to the assessment, and denying the right of the defendants to make the collection, was he at liberty to pay the tax and seek his remedy in an action to recover it back? These inquiries are answered by Ch. J. Shaw, who observed that, "Under the circumstances, we think it cannot be considered a voluntary payment, but a payment made under such circumstances of constraint and compulsion, that on showing that he was not liable, he may recover it back in this action, from the defendants *into whose treasury it has gone.*" The same doctrine was held in *Jainer v. Egremont*, (3 *Cush.* 572.) The assessment was held illegal. Dewey, J. observed: "The facts stated in the case show that the *collector demanded payment* of the plaintiff, and *threatened to enforce the same by legal process.* A payment to a collector of taxes under such circumstances is not that voluntary payment of a disputed demand that precludes the party thus paying from opening the question of the right to enforce such payment in an action to recover back the money thus paid." These cases do but commend themselves to the judgment and candor of intelligent and business men. In this state, where several decisions have been made on the subject of voluntary payments of taxes, the doctrine as held in the Supreme Court of the United States and Massachusetts has been recognized. In the case *The Hudson River Railroad Co. v. Marsh*, (2 *Kern.* 309,) the payment was held voluntary.

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The collector of one county having a tax list and warrant, went into another county to the office of the company, and requested them to pay the tax, which they did. The company afterwards ascertaining that the assessment was illegal, sought to recover it back. It was held that no recovery could be had. The court observed that "The warrant gave no authority to collect the tax by compulsion. It was only a demand of voluntary payment, and was not accompanied *in fact or apparently with a power to enforce payment.*" Whatever power the officer may have had in the county where he lived, he had none where and when the money was paid, as he was out of his jurisdiction. That no misapprehension might arise in the application of that case to others, Johnson, J. was careful to observe that "It does not stand upon the same ground as payments made to release property from seizure under process, either actually made, or about to be made." In *Forrest v. The Mayor, &c. of New York*, (13 Abb. 352,) the assessment was made in 1857, paid in 1858, and vacated in 1859. After the assessment, no attempt was ever made to collect or enforce its payment, no warrant was ever threatened to be levied, nor any demand or request for its payment ever made. The *plaintiff wishing to use the land by way of sale and mortgage*, paid the assessment under protest, and it was held a voluntary payment. In other words, *the desire to sell and mortgage the premises* did not, as the court said, render the payment compulsory, and that in this respect there was a distinction between real and personal estate. The protest did not render the payment any the less voluntary. It is obvious that the cases are too unlike in principle and facts for application. The case of *Fleetwood v. The Mayor, &c.* (2 Sandf. 478,) is of a similar character. Instead of contesting the legality of the assessment, the money was paid by the party upon a negotiation to raise money upon the premises by mortgage, and upon the requirements, not of the city authorities,

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*but of the party loaning the money*, as the matter was regarded as a cloud upon the title. The court held that the assessment created no cloud, and that whatever rule was applied to personal property on such payment, the rule in relation to involuntary or coercive payments, and the right to recover back money so paid, has no application to real estate. In the case of *Sandford v. The Mayor, &c.* (33 Barb. 147,) it was held that the assessment was legal, and that the proceedings in making the assessment and confirmation thereof were in due form of law. The commissioners of taxes had jurisdiction over the person and property assessed, as neither were exempt from state taxation. The objections urged, it was held, were waived by not insisting upon them in the course of the proceeding in making the assessment, and were not sufficient to render the assessment illegal or void. But if it were not so, the payment of it without objection, without the notice required by statute, and without any intimation that payment would be enforced by levy on property, rendered it a voluntary payment, and any subsequent misappropriation of the money gave no right to recover it back. There can be no application of that case to this, where the proceedings, in making this assessment upon property exempt from state taxation, were without the jurisdiction of the commissioners of taxes, and were resisted until they were held to be illegal and void, and when payment was enforced by the collector duly armed with a warrant, and threatening to levy the same on their property. (45 Barb. Rep. 321.) How far payments made under the mere threat that a suit would be commenced to recover the money back, may be regarded as compulsory, the court are not now called upon to consider; but the authorities are uniform in holding, that when payment is made to one, who is armed with a warrant or other final process, and who has levied or who threatens to levy the same on property to enforce it, the payment is regarded as involun-

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tary and compulsive, and if the claim or assessment is illegal, the money may be recovered back. Of that character is also the case of *Wisner v. Bulkley*, (15 Wend. 321,) in which it was held that an action lies to recover back money paid on an execution issued on a satisfied judgment. Bronson, J. observed: "That this was not a voluntary but a compulsory payment, under color of legal process. The plaintiff paid the debt to save his goods from sale on the execution." In this case, the plaintiffs paid the tax to save their goods from sale on a warrant—the judgment and the tax being alike illegal.

In relation to these various cases which have been considered, and which are relied upon to sustain this defense as a voluntary payment, it is obvious they involve no principles which have any application to this case; and while the payments in those cases were held voluntary, the courts were careful to except from the rule of voluntary payments that class of cases where the assessment was void, and where in the language of Johnson, J. (2 Kern. 309,) "the payments were made to release property from seizure under process, either already actually made, or about to be made."

The right of the plaintiffs in this case to recover the money paid on that illegal and void assessment rests, therefore, upon those adjudicated cases and general principles which have met with general application and approval, that when one is compelled to pay money upon an illegal claim to obtain the possession, or to protect himself in the use and enjoyment of his property from illegal detention and seizure, the money so paid may be recovered back, as having been obtained under those circumstances which the law pronounces a payment by compulsion, and which the party *ex æquo et bono* ought to refund. (*Shaw v. Woodcock*, 7 Barn & Cress. 73. *Maxwell v. Griswold*, 10 How. U. S. 241. *Atlee v. Backhouse*, 3 Mees. & Welsb. 633, 649. *Preston v. Boston*, 12 Pick. 7. *Chase v. Dwinal*, 7

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*Maine Rep.* 134.) 4. The fact admitted by the demurrer, that the receiver of taxes notified the plaintiffs that the penalty imposed by the act would be demanded and its payment enforced by warrant, unless the tax was paid, renders the payment compulsory. This was the direct ruling in *Maxwell v. Griswold*, (10 *How. U. S.* 242.) In that case, an importer proposed to enter his goods at the invoice price, being the sum actually paid; but the collector insisted that they should be entered at the value at the time of shipment, which would have occasioned such an addition to the invoice price *as would have subjected the importer to a penalty*, or that the importer should voluntarily make the addition to the invoice price, and so escape the penalty; the importer chose the latter alternative, and paid the excess under protest. It was held that such payment was involuntary and coercive, and that the money might be recovered back.

II. But, independent of the question whether the payment of that assessment was voluntary or coercive, the right of the plaintiffs to recover that money in this action arises from the adjudication of the Court of Appeals reversing the judgment of the Supreme Court under which the money was paid, and vacating the assessment of the commissioners of taxes.

The adjudication of the commissioners of taxes in determining the validity of the assessment was a judicial act, and when the assessment roll was perfected, confirmed and passed by the supervisors to the receiver of taxes with a warrant for its collection, it had the nature and character of a judgment at law. The judgment of the Supreme Court affirming the assessment on that property, determined the amount of that assessment upon which the tax was made, and, unappealed from, is as conclusive as any judgment at law. The only difference in the two cases is in the manner in which the rights of suitors are brought before the court for judicial determination. But

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when they are thus brought, in the manner provided by law, the adjudication upon those rights is as conclusive in one case as in the other, and each is enforced by final process. (20 *How. Pr.* 302, and cases before cited. *Vose v. Willard*, 47 *Barb.* 320.) The rule is well settled in this state, that "when money has been collected or received upon a judgment valid at the time, and binding between the parties, and that judgment is reversed, the money may be recovered back, although the money may not have been coerced by actual duress." "*The law, in such case, will imply a promise of repayment.*" (*Bank of U. S. v. Bank of Washington*, 6 *Peters*, 8. *Clark v. Pinney*, 6 *Cowen*, 297. *Sturges v. Allis*, 10 *Wend.* 355. *Garr v. Martin*, 20 *N. Y. Rep.* 306.)

It is immaterial, therefore, whether this money was paid voluntarily or by coercive measures. The assessment on which it was obtained has been held to be illegal and void, and the judgment of the Supreme Court on which it was paid has been reversed. The defendants have taken the property of the plaintiffs without compensation, and still retain it without excuse, legal, equitable or in good conscience. It would seem that the right to recover it is a simple truism.

III. It is insisted that the defendants are not liable in this action, even if in all other respects the plaintiffs are entitled to recover back the money, as the assessment and tax were imposed and collected under the authority of the statutes of the state, and not at the instance and direction of the defendants, and that they had no part or agency in its imposition or collection. The statutes directing the manner in which taxes are to be assessed, collected and paid, require the concurrence and action of the commissioners of taxes and assessments, the board of supervisors, the receiver of taxes, comptroller and chamberlain, to each of which, distinct and specific duties are

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assigned. (*Laws of 1859, p. 678. Id. 1850, p. 192, §§ 24, 25, 26, 27. Id. 1844, p. 369, § 8. Id. 1857, p. 879, § 22.*)

In public municipal corporations, the authority of its officers to bind the corporation is derived from the legislature, and they are made *pro hac vice* the agents of the corporation, or the persons by and through whom the corporation acts in the discharge of corporate duties. No one of the above boards or departments is capable of performing the duties assigned to the other, but each acting in their respective spheres, produces the result required by law, to wit, the legal assessment roll and tax, with power by warrant to enforce its collection and payment to the fiscal agent of the corporation, and which constitutes a portion of its revenues. For any *misfeasance* or *nonfeasance* in the discharge of their respective duties, a liability may rest upon each board or department, so far as they are not protected by the judicial character of their acts. But that in no way affects the plaintiffs' remedy against the defendants, where the avails of the assessment and tax have been paid into the hands of the city treasury. In the case of *Joyner v. Egremont*, (3 *Cush.* 570,) similar objections were taken, and the court observed that "The action is sustainable on the ground that when one party holds the money of another, illegally taken and detained from him, the money may be recovered back, irrespective of any liability of other parties who may have been the illegal agents in coercing the payment of the money." Their receipt of the money and detention of it, is a ratification and adoption of the acts by which the money was obtained.

The suggestion of the defendants, that the money to a great extent has been paid over for state and county purposes, if any importance is attached to it, is based upon facts not appearing in the case, and contrary to the fact as stated in the complaint and admitted by the demurrer. The fact admitted by the demurrer is, that the money was

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*received by the defendants through the receiver of taxes, and that they still retain and keep the same.*

*Richard O'Gorman*, for the respondents. I. The payment of the tax was voluntary. 1. The circumstances under which the payment of the tax sought to be recovered back was made are set forth in the complaint. It is claimed that the payment was not voluntary. (a.) Because it was "compelled" by the judgment of the Supreme Court at general term, affirming the validity of the assessment and the correctness of the decision of the tax commissioners, except as to \$25,000 of the capital stock of the plaintiffs. (b.) Because of the notice served upon the plaintiffs by the receiver of taxes, notifying them that unless the tax was paid by a certain day a penalty, by way of interest, would be added, and a warrant issued for its collection. No proposition can be more clear than that this payment was neither made under nor compelled by the judgment. All that the general term assumed to adjudge or decide was, that the plaintiffs were taxable upon all United States stock owned by them, which had been issued or contracted for prior to the act of 25th February, 1862, and that they were not taxable upon any portion of such stock which was issued or contracted for subsequent to the passage of the exemption act. The judgment neither fixed the amount of the tax, nor directed its payment, nor provided for its collection. As to this part of the tax, which has been paid, it left the plaintiffs just where it found them, subject to the statute proceedings and provisions. Suppose that, after the judgment of the general term, the plaintiffs had neglected to pay the tax, could an execution for its collection have been issued upon that judgment, or is there any other process known to the law by which its payment could have been enforced under that judgment? Clearly no; for the judgment, as before stated, neither fixes the amount, nor directs pay-



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ment, nor provides for collection. How, then, can it be pretended that the payment of the tax was made pursuant to the judgment? It may be that the judgment of the general term so weakened the confidence of the plaintiffs in the opinion of their legal advisers as to the validity of the tax, as to induce them, in a spirit of prudence and economy, to pay, *not the judgment, but the tax*, and thereby save the accruing interest to increase their dividends or add to their surplus; but beyond this they were not influenced by the judgment in making such payment. Again, the proceedings for the collection of taxes are regulated by statute, and no valid judgment for their recovery could be rendered. The assessment against the plaintiffs was made between the first Monday of September, 1861, and the third Monday of January, 1862, and the statute provisions for its collection are as follows: The assessment roll was delivered to the receiver of taxes on the 25th September, 1862. The plaintiffs then had until the 1st day of November following to pay the tax, and in case of payment they would have been entitled to a deduction of seven per cent. If not then paid, it would have been the duty of the receiver to advertise that, if the tax was not paid prior to 1st December, 1862, he would proceed to collect it. If not paid prior to 15th December, 1862, the receiver would be entitled to collect one per cent additional upon the amount of the tax, and if not paid prior to 1st January, 1863, the receiver would be entitled to collect an additional one per cent, and if not paid prior to 15th January, 1863, he could then, *but not until then*, issue his warrant for its collection. Now, the judgment of the general term is dated the 11th day of October, 1862, and the payment of the tax was made the 28th day of November, 1862. If, then, the relators' construction of that judgment is correct, we have a judgment directing the payment, and authorizing the collection of a sum of money which, by statute, was not due, or if due not collectable,

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for more than three months after the date and entry of the judgment. The correctness of the position that the judgment did not compel the payment is confirmed by the provisions of the act authorizing the review by certiorari. (*Laws 1859, ch. 302, p. 684, § 20.*) All that the court is empowered to do under this section is to review and correct upon the merits any decision or action of the commissioners under the sections of the act therein specified. The court could not, under this section of the act of 1859, either fix the amount of tax, direct its payment, or authorize its collection. The power of the court is limited to the determination of the question, as to whether or not the decision of the commissioners in determining the amount upon which a party should be liable to assessment was correct, and the further question, as to the validity and regularity of the commissioners' proceedings in making the assessment upon that amount. We have then a judgment of a court which neither fixes the amount of the tax, nor directs its payment, nor authorizes its collection, rendered too by a court having no power to determine, direct, or authorize either of these things, as the foundation of the claim that this payment was made involuntarily. How a judgment can compel an act which it neither authorizes nor directs is beyond all comprehension, and cannot be established by argument, and is not true in fact. The second circumstance upon which the plaintiffs rely to divest this payment of the character of a voluntary one, is the fact that they were notified by the receiver of taxes that, unless the tax was paid, an additional percentage would be charged, and a warrant issued for its collection. The receiver of taxes is an independent public officer, charged by law with the performance of certain duties with respect to the collection of taxes, and among others the following: The assessment rolls are by law required to be given to the receiver on or before the first day of September in each year. (*Valentine's Laws,*

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p. 1256, § 1. *Laws of 1850, ch. 121, p. 192, § 27.*) Upon the reception of the rolls it is made the duty of the receiver to collect and receive the taxes from persons assessed. (*Valentine's Laws, p. 1257, § 3. Laws 1850, ch. 121, p. 193, § 27.*) If taxes are paid before the first day of November succeeding the delivery of rolls to the receiver, certain deductions are to be made. (*Valentine's Laws, p. 1257, § 4. Laws, 1850, ch. 121, p. 192, § 29.*) If unpaid after the first day of November, it then becomes the duty of the receiver to give certain notices. (*Valentine's Laws, p. 1257, §§ 5, 6, 7. Laws 1850, ch. 121, p. 193, §§ 30, 31, 32.*) Indulging the legal presumption that public officers are presumed to have performed their duty, we are to presume that the receiver of taxes, in the service of the notice mentioned in the complaint, was simply engaged in the performance of the duty imposed upon him by statute. The question which now presents itself is, does the fact that the receiver of taxes served upon the plaintiffs the notices required by law render the payment of the tax compulsory? It is submitted that such was not its effect: the notice at most amounted to a demand of the payment of a tax, which the court had adjudged valid, and which demand the law directed and commanded the receiver to make. The notice did not *compel* payment; it only demanded it. The plaintiff voluntarily complied with that demand, and therefore is not entitled to recover back the amount of the tax. (*Sandford v. Mayor, 33 Barb. 147. Fleetwood v. City, of New York, 2 Sandf. 475. Forrest v. Mayor, 13 Abb. 350. N. Y. and Harlem R. R. Co. v. Marsh, 12 N. Y. Rep. 308.*)

2. There is a marked distinction between the case at bar and those cited on the part of the plaintiffs, upon the argument. The cases cited by the plaintiffs were either cases where the payment was exacted as a condition of the delivery of goods in the possession of the party demanding the payment, which goods belonged to the party making the payment, or cases where the proceedings sought to be

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enforced were void for want of jurisdiction. Now, it is not pretended that there has been any duress of the plaintiffs' property, and it cannot be denied but that the commissioners had *jurisdiction* to assess the plaintiffs, and it is clear that the action of the receiver in serving the notice was lawful. We have then, in this case, an assessment of the plaintiffs, a judgment affirming the validity of that assessment, a demand for payment made in compliance with the provisions of the statute, and payment made upon such demand. It is submitted, therefore, that this case is clearly distinguishable from those cited on the part of the plaintiffs. The secret of the payment made by the plaintiffs upon the demand of the receiver is quite obvious. Prior to the decision of the general term the plaintiffs were full of confidence in the correctness of their position as to the invalidity of the assessment. They accordingly refrained from paying their tax, and declined to avail themselves of the benefit of the deduction authorized by the twenty-ninth section of the act of 1850, (*Laws of 1850, ch. 121, p. 193, § 29,*) which was intended to encourage and reward the prompt payment of taxes. The decision of the general term, however, affirming the validity of the assessment so weakened their confidence in their claim to exemption that they preferred, upon the first demand, to pay their tax, rather than to run the gauntlet of the *interest* provided for in the thirtieth, thirty-first, thirty-second and thirty-fourth sections of the act of 1850. (*Laws 1850, ch. 121, p. 193.*) Unless, therefore, the doubts of the plaintiffs as to their right to exemption from taxation constitutes compulsion on the part of the receiver of taxes or the defendants, it is insisted that the payment cannot be regarded otherwise than as voluntary.

II. Conceding that the payment of the tax was compulsory, yet the defendants are not liable. 1. The defendants had no part or agency either in the imposition or collection of the tax. The tax was levied and collected under

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the authority of the statutes of the state, and not at the instance or direction of the defendants. Reference to the provisions of law under which the tax was collected and in pursuance of which it was levied, will determine the question as to whether or not the officers by whom those provisions of law were executed and carried out were the agents of the defendants, as charged in the complaint. (*Laws of 1859, ch. 302, p. 678.*) This act provides for the assessment of taxes in the city of New York. It will be seen from an examination of its provisions, that the defendants have no voice in the appointment of, or control over, the persons by whom the assessments are made. It is true that the power of appointing certain of these officers is conferred upon the comptroller of the city of New York, but this does not render the appointees the agents of the defendants, since the comptroller does not derive the appointing power from them, nor have the defendants any authority to vest the comptroller with such power. The comptroller, in making the appointment, exercises a power specially conferred upon him by a statute of the state, and should, therefore, be regarded as the officer or agent of the state in making the appointment. The imposition of the tax is made by the supervisors of the county of New York. (*Laws of 1850, ch. 121, pp. 192, 193, §§ 24, 25, 26, 27. Valentine's Laws, p. 1282.*) That the board of supervisors of the county of New York is an independent public body, entirely distinct from the defendants, it does not require any argument to establish, since it has already been judicially determined. (*Halstead v. Mayor, 3 Comst. 430. People v. Edmonds, 15 Barb. 529. Baker v. Mayor, 9 Abb. 82.*) On the question of agency, therefore, it only remains to be considered whether the receiver of taxes acted as the agent of the defendants in the service of the notice mentioned in the complaint and in the collection of the tax paid by the plaintiffs. The existence of the re-

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lation of principal and agent between two parties gives to the former the right to govern, direct, and control the acts of the latter. Certainly it will not be contended, in the face of the provisions of law prescribing the duties of the receiver of taxes, and to which reference has already been made, that the defendants had the power to direct that officer not to serve the notices required by law, and not to collect or receive the tax as commanded by statute. It is clear that the practical effect of the exercise of such a power by the defendants would be to abrogate the provisions of law defining the duties of the receiver, and to excuse him from their performance. Yet it is evident that the existence of such a power in the defendants is necessary to establish the relation of principal and agent between the receiver and the defendants. It is submitted, therefore, that no proposition can be more absurd than that the receiver of taxes acted as the agent of the defendants in the collection of the tax in question. 2. There is no force in the argument or proposition that the defendants are liable in this action because they have received the amount of the tax. The tax was paid to the chamberlain by the receiver of taxes. (*Laws 1844, ch. 238, p. 369, § 8.*) The provisions of law above cited, make it the duty of the receiver of taxes, upon the payment of any tax to him, to pay the amount thereof, on the day of payment to him, to the chamberlain, who by law is charged with the custody of all moneys belonging either to the city or county. (*Valentine's Laws, p. 273. Laws of 1857, vol. 1, ch. 466, p. 879, § 22. Valentine's Laws, p. 1132. 2 R. L. of 1813, ch. 86, p. 399, § 151.*). The tax having been paid to the chamberlain in strict conformity to the provisions of law, directing and governing such payment, it follows that the possession of the chamberlain was a lawful possession, however illegal the tax may have been in its inception. Indeed, legal or illegal, the defendants would have been powerless to prevent the payment of the tax by

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the one officer or the receipt of it by the other. They could not shut the doors of the treasury upon a fund to which the law declared they should ever be opened. The tax had been assessed and collected as has already been shown, without the slightest agency on their part. The statute of the state had selected and appointed its destination when so collected, and no power, save that which had selected its destination, could change it. Where or how was the amount of the tax to be deposited if not as the law directed? Who would be responsible for its safe keeping? Would a direction from the defendants to the receiver not to pay, or to the chamberlain not to receive, excuse, or justify those officers in their neglect to perform a plain statutory duty. Would such direction, if made, have been binding upon either of those officers? Most clearly it would not. There is then neither reason nor justice in the claim that, because the chamberlain received the amount of the tax, the defendants are liable in this action for its recovery. That would indeed be a harsh rule of law which would hold the defendants personally liable for money which the chamberlain was compelled by law to receive, because he received it. This presents another distinguishing feature between the case at bar and some of those cited by the counsel for the plaintiffs. In those cases the action was against the officers or parties who were *illegally* in the possession of the money or property sought to be recovered, which illegality consisted either in an entire want of jurisdiction in the proceedings in which the money was collected or the property seized, or in the total absence of any right in the party prosecuted to the possession of the property. In those cases the action was against the wrongdoer. In this case it not only appeared from the provisions of law governing the assessment and collection of this tax, that the defendants had no agency in the matter, but also that they were powerless to prevent the chamberlain from receiving it. 3. Under the circumstances of

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this case it is impossible for the court to render an intelligent and just decision in favor of the plaintiffs. The plaintiffs, in their complaint, assume that the entire tax assessed against them was levied and collected for the use and benefit of the defendants. It certainly is the only theory upon which the action can be supported, for surely it will not be contended that the defendants, being innocent of any wrong, are liable to the plaintiff in a sum greater than that which they have received and enjoyed. This tax was levied in the year 1862, and was levied under the authority conferred upon the board of supervisors, by the various statutes referred to in the following reports: Annual report of comptroller for year 1862, relative to county government. County taxes, p. 64. State taxes, p. 150. Annual report of comptroller for 1862, relative to city government. City taxes, pp. 89, 90, 91. The examination of these reports will disclose that, under the various provisions of law therein referred to, there was levied by the board of supervisors of the county of New York for the year 1862, taxes to the amount of \$11,830,730.06, for the following purposes: State purposes, \$2,212,930.34; county purposes, \$4,655,582.34; city purposes, \$4,962,226.38. Of this sum, the state and county taxes, amounting to the sum of \$6,868,512.68, was never in the possession nor under the control of the defendants. This is apparent from the provisions of law to which reference has been heretofore made. The entire amount of the tax collected for the year 1862 was paid to the chamberlain by the receiver of taxes, as the same was collected by him. (*Laws of 1844, ch. 238, p. 369, § 8. Valentine's Laws, p. 1255, § 8.* The state and county taxes were received by him as county treasurer. (*Laws of 1813, ch. 86, p. 151. Valentine's Laws, p. 1132.*) The former were paid over to the state treasurer, as required by law, (*1 R. S. 5th ed. art. 2, ch. 13, p. 925, § 38,*) the latter immediately placed to the credit of the county; the conclusion, therefore, is irresistible that the defend-



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ants were never interested in, or in possession of, or benefited by that portion of the tax for 1862, applicable to state and county purposes. The tax paid by the plaintiffs was levied for state, city and county purposes, and it should be presumed that it was applied to the purposes for which it was levied. It cannot be pretended that the defendants would be liable for that proportion of this tax, applicable to state and county purposes. Indeed such a claim would conflict with the theory upon which this action is based. There is no means by which the portion applicable to state and county taxes can be distinguished from that applicable to city purposes, since the tax was levied and paid in gross. There is, therefore, no data within the reach or knowledge of the court which will enable it, under the circumstances of this case, to render an intelligent and just judgment, and to determine what proportion of the tax paid by the plaintiffs is devoted to the use of the defendants. It will be observed upon reference to the various acts under authority of which the taxes for the year 1862 were levied, that the entire amount of the tax was appropriated by the legislature to specific purposes and objects of expenditure. Of the county taxes there was appropriated for "salaries—judiciary" the sum of \$225,950 of the city taxes, there was appropriated the sum of \$115,233 for "salaries—city courts." The judges and justices of the respective courts have been paid their salaries for the year 1862 out of the taxes levied for the year. They, therefore, equally with the defendants, would be liable to an action to recover it back, if the mere fact of having received a portion of a tax illegally assessed, levied or collected, can be held to render a party liable to an action for its recovery.

Would the defendants be justified in refusing to apply taxes which had been levied and collected to the purposes designated by law upon the plea that they had been ille-

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gally levied and collected. The answer to such a plea is obvious. You have nothing to do with the legality or illegality of the tax. The money is in your possession, and the statute directs you to disburse it for specific purposes. Perform your statutory duty; you are not constituted judges of the legality of the tax, but the disbursers of it, and if ever you are called upon to account for your action, the statute which compelled you to receive it, and made it your duty to disburse it, shall be to you a complete and perfect justification.

There is no provision of law which clothes the defendants with any power, or imposes upon them any duty with respect to the imposition or collection of taxes. On the contrary, the whole matter of taxation is a question of state concern. The power of taxation is a sovereign power, and is exercised by the state for the purposes of realizing a revenue with which to defray the expenses incident to the due administration of the government. The duties of the officers charged with the assessment and collection of taxes are in no sense private or corporate, but are judicial and administrative; and in the performance of those duties the officers do not act as agents or servants of the defendants, but as officers of the state government which authorized the tax, designated the manner in which it should be assessed and collected, and the purposes to which it should be applied. The defendants having had no agency in the imposition or collection of the tax in question, there is no principle upon which they can be made liable in this action. (*Lorillard v. Town of Monroe*, 12 Barb. 161; affirmed, 1 Kern. 392.)

*By the Court*, GEO. G. BARNARD, P. J. The payment was voluntary. There is no case permitting a recovery back of money paid under circumstances like those disclosed by the complaint. A competent authority, and having jurisdiction over the subject of assessment, for

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purposes of taxation, and over the plaintiffs' property, did assess the plaintiffs for personal property. The plaintiffs complained, and applied to the courts for redress. Before the final decision in the Court of Appeals, the officer having charge of the collection of taxes gave a notice, doubtless as required by law, to the plaintiffs, requiring payment, or that, in the event of non-payment, a warrant would be issued to collect the same. The plaintiffs then pay the assessment. There was no warrant—no seizure—no threatened seizure—no payment of money to free their property from the possession of another—no ignorance of the facts. It was a pure, voluntary payment, and no action will lie to recover the same back. I think the action cannot be maintained if payment was coercive. The action is the old action for money had and received. It existed and was upheld in all cases where a defendant obtained possession of the plaintiff's money, which, in justice and equity, could not be retained. A receipt of the money, and a lack of legal right to retain it, were both necessary in the action. Jurisdiction to impose and collect taxes are established and regulated by state authority. Minute provision is made for the various steps necessary to be taken by the several officers, and the money received is finally applied by state law. In every city the tax is made up for three separate purposes. One part thereof is destined for the state itself; one part for the county; and one part for the city. The city has no power to add to, or take from, the tax books, and no control whatever over the receiver of taxes. The city has had from the chamberlain its portion of taxes raised, but so also have the state and county. Who is chargeable with the plaintiffs' money? Who had it? Who received it? Who retains it, against equity and good conscience, from the plaintiffs? The city, for its purposes, has received less than a third of the taxes raised. I cannot see that the city of New

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York has either imposed an illegal tax on the plaintiffs, or received the proceeds of an illegal tax collected from the plaintiffs.

The judgment should, therefore, be affirmed, with costs.

[NEW YORK GENERAL TERM, January 6, 1868. *Geo. G. Barnard, Ingraham and Sutherland, Justices.*

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## PRITCHARD vs. THE BANK OF CALIFORNIA.

## FISKE and others vs. THE SAME.

Under section 243 of the Code of Procedure, which provides that the sheriff shall be entitled to poundage upon the amount paid on the "settlement" of an attachment suit, the sheriff is entitled to poundage where an arrangement is made by which the defendants agree to pay certain drafts if the suit shall be discontinued, and this is done, and the money paid.

**A**PPEAL from an order of Justice INGRAHAM, taxing the fees of the sheriff, under attachments issued in the above actions. The following opinion was given by

INGRAHAM, J. The sheriff, under section 243 of the Code, is entitled to poundage on the amount paid on the settlement of an attachment suit. The plaintiff held the drafts, and the attachments were issued to collect them. A settlement was made, viz. to pay the drafts if the suits were discontinued. This was done, and the money paid. That entitled the sheriff to poundage on the sum paid.

The right to poundage does not depend on the recovery in the suit, but on the sum paid to settle; and it does not alter the sheriff's right, if the plaintiffs agree to discontinue first, in order to get their pay. The sheriff cannot be deprived of his poundage by such discontinuance.

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The sheriff is entitled to poundage on the amount paid to take up the drafts.

*John E. Burrill*, for the plaintiff

*Ira D. Shaffer*, for the sheriff

*By the Court*, GEO. G. BARNARD, P. J. By section 243 of the Code, it is provided that the sheriff shall be entitled to poundage on the amount paid on the "settlement of the suit in which the attachment was issued." The word "settlement" is thus defined "act of settlement; adjustment" &c. Was there a settlement here? That there was, is as clear as the sun. The plaintiff's ownership of the drafts in suit is conceded, and that money, belonging to the bank, in an amount more than sufficient to satisfy the plaintiff's demands was duly attached, is clear. The suits were not defended. They were the subject of amicable adjustment. The plan of settlement was this: discontinuance of the suits, and thus release our money from the lien of the attachments, and we will appropriate the same to the payment of the drafts. This proposition was assented to, and the arrangement proposed consummated. The amount of the drafts, without interest or costs, was paid, and Judge INGRAHAM has allowed poundage on the amount thus paid. The ruling of the judge was clearly right.

Orders affirmed, with costs.

[NEW YORK GENERAL TERM, JANUARY 6, 1868. *Geo. G. Barnard, Sutherland and Ingraham*, Justices.]

PETER CYTHE *vs.* ABRAM LA FONTAIN, impleaded with  
Francis Valley.

51 186  
77h 386

51 186  
88h 229

51b 186  
161a 334

In an action of ejectment, brought by a vendor, or his grantee, to recover lands in the possession of the defendant under an executory contract of sale, for default in the payment of one of the installments at the time fixed upon by the contract; *held* that the defendant might interpose an equitable defense, and the court would consider the case in the same view as though the defendant had commenced a cross action and applied for an injunction.

The decision of such a question consists of a single conclusion of law, and a general exception is sufficient.

When the grounds of defense may be clearly understood by the answer, and the parties go to trial and actually try the very question on which their rights depend, objections to the answer on account of a defective statement of facts will be disregarded on appeal.

Where the plaintiff had taken a conveyance of the lands, and an assignment of the contract, with notice of the purchaser's equity; *Held* that he was in no better position to enforce a forfeiture than his assignor.

When the time of payment has been extended with the assent of the vendor, and no certain time fixed when payment will be required, the vendor cannot afterwards forfeit the contract by requiring immediate payment, but the vendee is entitled to a reasonable time after notice, to make his payment.

*It seems* that the vendor may deprive himself of the right to exact a forfeiture by afterwards refusing payment upon another and untenable ground.

An action of ejectment by the vendor to recover possession for default in payment of the purchase money, being a legal action, as defined by the Code, the defendant, if he succeeds, is entitled to costs, although in an equitable action for the same relief he might be charged with costs.

**A**PPEAL from a judgment rendered upon the decision of the court at circuit, upon a trial by the court without a jury.

The action was ejectment to recover the possession of certain premises in possession of the defendant under a contract of purchase, upon the allegation that La Fontain, the purchaser, had made default in the second payment as provided for in the contract. The defense was that the time of payment had been extended by parol contract, and that before the commencement of this suit the defendant La Fontain tendered the amount of the payment and the interest that had become due on the same; and that

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*Cythe v. La Fontain.*

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the said defendant has always, since said tender, been ready and willing, and is still ready and willing, to pay the same, and that he has brought the money into court ready for the plaintiff if he will accept the same.

On the trial the contract was produced and proved, by which it appeared that on the second day of August, 1864, Francis Ponto, by his written agreement of that date, for the consideration of the sum of \$107.75 to be duly paid by Abram La Fontain, contracted to sell the premises in question situated in the town of Champion, Jefferson county, to La Fontain; and that La Fontain agreed to pay the same in three equal payments, together with interest to be paid annually; the first payment to be made 29th of June, 1865, the said La Fontain to have possession on and after the date of the said agreement, and in case of failure of payments, the contract to be void.

The defendant went into possession, but the payment that became due June 29, 1865, was not made. There was evidence tending to show that it was postponed by consent of the vendor; that afterward Ponto called upon him for it, but he was not prepared to make it, when he declared his intention to sell the land to the plaintiff, and that La Fontain expressed his willingness that he should sell.

On the 3d of July, 1865, Ponto and his wife conveyed the premises to the plaintiff for the consideration of \$115.35, and at the same time Ponto assigned to the plaintiff the contract of sale. On the same day the plaintiff served upon La Fontain a written notice declaring the contract to be null and void and demanding a surrender of the premises. On the 5th day of July, 1865, La Fontain attempted to make a tender, and on the 6th day of July actually tendered the amount due on the contract with interest. The only reason the plaintiff gave for not accepting the tender, was that it was not enough.

The judge on the trial found as additional facts that

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the time of payment was extended; that on the 3d day of July, Ponto requested payment and that La Fontain said he could not pay, and also told Ponto to sell, and requested time of the plaintiff in the event he purchased. This fact is found against the evidence of La Fontain, who testified that he did not assent to the sale to the plaintiff, nor did he understand that Ponto intended to sell, or the plaintiff to purchase any thing beyond the payments.

It is also found by the judge that the value of the premises was considerable more than the amount due upon the contract, so that it would be improbable that La Fontain should be willing to forfeit his contract. As a matter of law the judge found that the transaction of the 3d of July was a rescission of the contract, and that La Fontain cannot now insist upon any rights under it, and thereupon ordered judgment for the plaintiff.

*Jas. F. Starbuck*, for the plaintiff.

*L. H. Brown*, for the defendant.

*By the Court*, MORGAN, J. The case contains only a general objection to the legal conclusion of the judge upon the trial, and if this was strictly a legal action, and did not depend for its decision upon equitable considerations, it is doubtful if we have any authority to review the case.

Under the Code of Procedure, the defendant may, however, interpose on equitable as well as a legal defense; and when it is inequitable to enforce a penalty or forfeiture, the court may doubtless consider the case in the same view as though the defendant had commenced a cross action, or applied for an injunction to restrain the vendor from proceeding against the vendee in ejectment. An injunction was formerly applied for in such case, and granted, when



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the court, under the circumstances, deemed it equitable to relieve the tenant from a forfeiture of his estate.

This jurisdiction was often ancillary to that in *specific performance*, for the purpose of preventing the defendant making use of the legal interest vested in a way inconsistent with the equity claimed by the plaintiff; and an injunction was allowed on the plaintiff showing a *prima facie* case for *specific performance*. (1 *Waterman's Edu. on Injunctions*, 49, 50. *Fry on Specific Performance*, 334, § 760.)

And this relief has been applied to cases where a specific performance of a contract is sought to be enforced, and yet the party has not punctually performed the contract on his own part, but has been in default, (2 *Story's Eq. Jur.* § 1315,) especially when the party comes *recenti facto* to ask performance; the suit is treated with indulgence, and generally with favor by the court. (*Id.* § 776.) When time is of the essence of the contract it may be waived by proceeding in the purchase after the time has elapsed, although if the other party on notice to perform is afterwards guilty of improper delays in completing the purchase, the relief will be denied. (*Id.*)

When the terms of an agreement have not been strictly complied with, or are incapable of being strictly complied with, still if there has not been gross negligence in the party and it is conscientious that the agreement should be performed, a court of equity may interfere, and decree a specific performance. (*Id.* § 775. *Willard's Eq. Jur.* 292, 293, 294.)

The judge, in his opinion, expresses regret that he is compelled to come to the conclusion he does, as it may deprive the defendant of a valuable interest in the property. I think it is apparent that the learned judge did not look into the equity of the defendant with a view of relieving him from the forfeiture of his contract. The evidence tended very clearly to show that the defendant did **not** intend to forfeit the contract, and that he probably

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labored under a misapprehension as to his rights. It appears that he immediately applied to the plaintiff, after he took a conveyance of the premises, for further time to make his payments; but the plaintiff immediately gave him notice of forfeiture. This is wholly inconsistent with the conclusion that the defendant supposed that he had consented to a rescission of the contract, whatever the other parties might have thought of it.

It would seem from the evidence in the case that the defendant acted in ignorance of his rights; but as he offered to pay on the fifth of July, it would be very harsh to deprive him of a valuable interest, because he had, in ignorance of his strict duty, neglected to pay from the 3d to the 5th of July. And there are respectable authorities which declare that the plaintiff waived the forfeiture on the 6th, when the payment was actually tendered, by refusing it upon another and untenable ground. Although the offer of payment was too late to subject the plaintiff to damages for non-performance, it was in season to deprive the plaintiff of his right to insist upon a forfeiture. (*Friess v. Rider*, 24 N. Y. Rep. 367, *Allen, J. citing and commenting upon the authority of Gould v. Banks*, 8 Wend. 562.)

It was said by Cowen, J. in *Wright v. Moore*, (21 Wend. 234,) that when the vendee declares that he cannot pay, and that the land must probably revert, there appears to be an end to all implied understanding that the possession should continue, and a court of equity would, after that, feel *reluctant* to interfere and protect the possession, even in the event of the vendee's changing his mind, and offering to pay. The power of a court of equity thus to interfere, is here acknowledged, and where it would be unconscientious for the vendor to insist upon a forfeiture in such a case, I think the court would be somewhat astute to seize upon almost any circumstance which would deprive the vendor of the right of enforcing a forfeiture. And there

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is a manifest distinction between cases where a forfeiture is claimed, and where it is resisted. Where it is claimed, it may be waived according to the authorities by the vendor putting his refusal to accept upon untenable grounds; but while the vendee may thus get rid of a forfeiture, he cannot take advantage of it to enforce a penalty or forfeiture against the vendor.

In my opinion the equity of the defendant to apply for a specific performance of the contract upon tendering payment was not sufficiently considered by the learned judge on the trial. The claim of the defendant to a specific performance of his contract is an application to the equitable jurisdiction of the court; and in such a contract time is not generally considered very material, because the land sold was not of greater or less value, according to the effluxion of time. And the parties themselves treated it as not of the essence of the contract, for the judge finds, as I understand the case, that the time of the second payment was extended by parol until notice should be given by the vendor that he required the same; and no notice was given that payment was required until the third day of July, and then the vendee was requested to pay *immediately* or else the vendor would sell and convey the premises to the plaintiff. Upon a conveyance that day to the plaintiff which was accompanied by an assignment of the contract, the plaintiff gave immediate notice to the defendant that the contract was forfeited for non-payment of the second installment.

As notice was required on the third day of July, before the defendant could be considered in default, it is apparent the notice should have given the plaintiff a reasonable time to make the payment. As was said by Chancellor Walworth in *Harris v. Troup*, (8 Paige, 427,) it would be inequitable after the vendee had waived the forfeiture "to suddenly stop short and insist upon a forfeiture, without any previous intimation that he intended to do so."

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Without doubt, the vendor after waiving payment at the time fixed by the contract, could by proper notice bind the defendant to make the payment within a reasonable time, which time must greatly depend upon the circumstances of the particular case; and three days notice by a vendor would, it seems, be too short. (*Dart on Vendors and Purchasers*, 211. *Sug.* 306.) And it was held in *Durand v. Sage*, (11 *Wis. Rep.* 151,) that where there had been a default in making payment upon a contract for the sale of real estate, and the party to whom the money was due, did acts which waived the payment, the time of payment was not so much of the essence of the contract that one day's default should defeat the rights of the other party. In *Edgerton v. Peckham*, (11 *Paige*, 352,) the question is discussed with great research and ability, by *Gridley*, vice chancellor, where it is clearly shown by citation of numerous authorities that the court may relieve the vendee from a forfeiture of his contract, after it has been partly performed, and there has been no change in the circumstances of the parties; and when the omission to pay at the exact day has not been so unreasonable as to furnish evidence of abandonment of the contract by the vendee, or in some degree to have affected the circumstances of the parties or the property in question.

In my opinion, the plaintiff could not terminate the contract without giving to the defendant a reasonable time to make the payment; and, I think, the defendant never intended to abandon the purchase. The contract was in full force when the plaintiff took the conveyance, for he undertook to deal afterward with the defendant and forfeit the contract. To enable him to do that, he took an assignment of the contract, as well as a conveyance of the legal title. It is made a question whether the plaintiff merely purchased the payments or the land. I do not regard the question of any importance, except as it may have confused or misled the defendant. The plaintiff paid

\$115.35 for the conveyance, which was just the amount due upon the defendant's contract of purchase. This was much less than the premises were worth. If the defendant had then paid the second installment, the plaintiff would have realized the amount he paid for the conveyance, with interest. But, if he could, by his dealings with the defendant, forfeit the contract, he would have obtained the premises, valued at nearly \$400, for the sum of \$115.35. As the defendant was excited, and may have been quite ignorant of the English language, it was not a difficult matter for the plaintiff to adopt a course of conduct towards him which would furnish an excuse for terminating the contract. The defendant, however, testified that he supposed that the plaintiff was simply buying the payments. If the plaintiff had explained, and informed the defendant that he intended to forfeit the contract for non-payment, if he did not pay within a reasonable time; and if he had waited such reasonable time, the case would be different.

The principle upon which the court proceeds in such a case is, that one party ought not to take advantage of a legal right, when its rigid exercise would produce loss or injury. If the vendor can have the full benefit of his contract, as originally provided, the court regarding the substance of the transaction, and having authority to do so, will relieve against a forfeiture or penalty, and will sustain the performance of the contract, if it can administer real justice between the parties. (*Jeremy's Eq. Jur.* 471.)

There is no doubt as to the real justice of the case. If the defendant is allowed to perform the contract, he only retains what clearly belongs to him, while the plaintiff will obtain all he has paid, with legal interest. The value of the property is not fluctuating, and there has not been such an unreasonable delay, in the payment of the second installment, as to furnish evidence of an abandonment;

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while I am quite certain that the defendant never intended to abandon it, although he may have been caught in the use of language, which may have given color to such an inference. Upon the facts detailed in the evidence and findings of the judge, I am of opinion that the defendant is entitled to a specific performance of the contract by the plaintiff.

The defense set up does not claim affirmative relief. But that is not necessary. Even in a complaint, if the facts stated entitle the plaintiff to a particular relief, the plaintiff may proceed as though he had prayed in terms for such relief, although the complaint contains no such prayer. (*Emery v. Pease*, 20 *N. Y. Rep.* 62.) And a defect in the complaint or answer is aided by proving the facts material to the cause of action or defense. (*Lounsbury v. Purdy*, 18 *id.* 515.) And when the ground of defense may be clearly understood by the answer, and the parties go to trial, and actually try the very question on which their rights depend, objections to the answer, on account of a defective statement of facts, will be disregarded on appeal. (*Phillips v. Gorham*, 17 *id.* 275.) And in *Bate v. Graham*, (11 *id.* 237,) a complaint was amended after appeal by adding a material allegation.

There having been no objections taken upon the trial, as to the form of the answer in this case, and the facts appearing in evidence upon which the rights of the parties depend, I am of opinion that it is the duty of the court, on appeal, to treat the answer as sufficient, and, if it is not, to allow an amendment. (*Wright v. Whiting*, 40 *Barb.* 235.)

Upon the facts proved on the trial, and found by the judge, the question is, whether, according to the whole law of the land applicable to the case, the plaintiff makes out the right which he seeks to establish, or the defendant shows that the plaintiff ought not to have the relief sought. (*Johnson, J. in Crary v. Goodman*, 2 *Kern.* 268.) The decision in this case consisted of a single conclusion of

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law, from an undisputed state of facts, and a general exception is available. (9 *N. Y. Rep.* 663. 10 *id.* 328.)

The action is, doubtless, to be regarded as a legal action for the recovery of specific real property, and is triable by a jury. The Code, however, has made a provision in such a case that the jury may render a general or special verdict; but, if they render a general verdict, the court may instruct them to find upon particular questions of fact, to be stated in writing. (*Code*, § 261.) And when a special finding of facts is inconsistent with the general verdict, the former controls the latter, and the court is required to give judgment accordingly. (*Code*, § 262.) And the court may, in giving judgment, grant to the defendant any affirmative relief to which he may be entitled. (*Code*, § 274, *sub.* 2.) When the trial is without a jury, doubtless the court may render the same relief.

The circumstances which, in a court of equity, would authorize the court to interfere to protect a tenant or purchaser in possession of real estate against a forfeiture, have never been considered proper subjects of trial by a jury; but when the jury find the facts upon which the right to relief depends, it is the duty of the court to proceed to administer the law upon principles of equity applicable to the facts thus found. The Code has not made any provision, in such a case, authorizing the court to deal with the question of costs; but the costs are chargeable to the plaintiff, although the defendant, in an equitable action for specific performance, may be charged with the costs, or the relief may be awarded to him without costs. This is to be regretted, but I know of no authority for denying costs to the defendant, if he succeeds in this action. As to the costs of appeal, they are in the discretion of the court. (*Code*, § 306.)

In my opinion, the judgment should be reversed, without costs, and a new trial granted. There is, however, no necessity for another trial, as upon the facts of the case as

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disclosed on the trial before the judge, the defendant is entitled to a judgment in his favor, he having brought the amount of the second payment into court, where it remains, subject to the order of the plaintiff. But I am not aware that we can direct final judgment, in such a case, for the defendant. If not, the cause will have to go back for a new trial.

FOSTER, J. concurred.

Judgment reversed, and new trial granted.

[ONONDAGA GENERAL TERM, January 7, 1868. *Foster, Mullin and Morgan*, Justices.]

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## BROOKS vs. GALSTER.

Where land is rented for a nursery, the tenant must remove the trees before he quits possession, on the termination of his lease, or the title will vest in the owner of the reversion.

**A** PPEAL from a judgment entered upon the report of a referee. The plaintiff's claim was for a conversion of a quantity of nursery trees growing upon the land of the defendant. The land originally belonged to Ephraim C. Fitzgerald, and he leased ten acres to H. M. Ranny and H. M. Conkling for a nursery, from year to year. The lease appears to have been in writing, but it was not produced or proved on the trial. Conkling afterwards sold the nursery to Ranny, and afterwards the trees were sold by the sheriff on an execution against Ranny, to James Johnson, and Johnson sold them to J. Dwight Alvord. The land on which the nursery was cultivated was afterwards and on the 15th day of July, 1864, conveyed to John M. Jaycox. Jaycox let the farm to Thomas Brintnall to cultivate on shares from April 1, 1865, with the

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privilege of another year, and Brintnall, in fact, accepted it for two years, up to April 1, 1867.

In the mean time the nursery grounds had dwindled down from ten acres to two acres of ground, and with the consent of Jacox, Brintnall rented the two acres to Alvord for the sum of thirty-five dollars, no particular time being fixed when the lease should expire. Alvord took up a large number of the trees, some in the spring of 1866. In the latter part of April, 1866, Alvord sold the remaining trees to the plaintiff. An arrangement was then made between Brintnall and Brooks, by which Brooks was to have until a certain time to remove the trees, and Brooks paid him, or agreed to pay him, for the use of the two acres in the mean time. Brintnall testified that he only gave him until the first of April, 1867, while Brooks claimed that he was to have until the season expired for nursery trees, and the referee finds that the season for removing trees did not expire until about May 1.

Jacox conveyed the land on which the nursery was situated to the defendant September 18th, 1866, and agreed to yield up the possession on the first day of April, 1867, at which time the defendant actually took possession of the premises.

It does not appear that the defendant knew what claim, if any, the plaintiff had upon the nursery, when he purchased the premises of Jacox. A few days after the first of April, 1867, the plaintiff went to the defendant, and claimed and asked for the trees. The evidence is contradictory as to what took place at the time. Brooks testified that the defendant told him that he did not know any thing about it; that he had bought the farm without any restriction, and that the trees belonged to him. The defendant testified that he told the plaintiff if he owned the trees to take them away; but if he took them, he must take them clean out; that the plaintiff replied that if he could pick them out he would take them, and that he

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(defendant) declined to let him pick them out. Afterwards, and on the 25th of April, 1867, this suit was commenced.

The referee found as matter of fact, that Brintnall's contract expired April 1, 1867. And he refused to find that the plaintiff rented the nursery grounds of Jaycox or Brintnall for another season for nursery purposes. And among other things, he found as matter of law that the defendant on taking possession of the land, on the first of April, 1867, became the absolute owner of the trees in question, and that the refusal of the defendant to allow the plaintiff to remove the trees unless he would clear the ground of them was not a conversion of said trees. To these conclusions of fact and law the plaintiff in due time excepted.

*J. Garfield*, for the appellant.

*J. C. Hunt*, for the respondent.

*By the Court*, MORGAN, J. The case contains numerous propositions of law and fact, which are not deemed material in the consideration of the only question involved in this appeal. It is unnecessary to concur with the referee in all his conclusions, for if he is right as to the contract or letting between Brintnall and the plaintiff, there is no ground upon which the plaintiff can claim the property after the first day of April, 1867, as against the defendant.

Passing over all the leases down to the letting made by Brintnall in 1865, and conceding that by the terms of that contract the plaintiff was entitled to the first of May, 1867, to remove the trees, still it does not appear that Brintnall renewed the lease beyond the first day of April, 1867. Brintnall swore that he did not agree to give Brooks a longer term than he had, and that he told the plaintiff he had no right to let it beyond April, 1867. Now, while the

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plaintiff gave some evidence tending to show that he hired it for another season, and while it may be conceded that the season proper for digging up and removing trees does not expire until the first of May, still it was competent for Brintnall to limit the time to the first of April, 1867, even if we concede that he had authority from Jaycox to extend the time beyond that, which does not appear.

Under the most favorable construction of the evidence, the owners of the trees had only a tenancy from year to year, when Jaycox took a conveyance of the premises. If there had been no new agreement as to the time when the tenancy should expire, it might be considered as extending from May of one year to May of the next year, during the season for digging up and removing nursery trees. But there was an agreement for a renewal, which, as I understand the case expired April 1, instead of May 1867. Brintnall's lease expired on March 31st, 1867, and he did not assume to have any right or authority to extend the plaintiff's term beyond his own. Clearly, therefore, the plaintiff's tenancy, as to the two acres, expired with Brintnall's term.

As to the right of the plaintiff to dig up and remove trees after that time, against the permission of the owner of the land, there can hardly be two opinions. These trees were fixtures, growing in the soil of the defendant, and the general rule undoubtedly is, that the tenant must remove them before he quits possession on the termination of his lease. (2 *Kent*, 346.) When the tenancy is at will or sufferance, the tenant is entitled to a reasonable time after its expiration. (1 *Hilliard on Real Property*, 68.) And when the tenant quits possession without removing a fixture, he is understood to make a dereliction of it to the landlord. (*Id.* *Hill on the Law of Fixtures*, § 31.) In *Lee v. Riden*, (7 *Taunt.* 188,) it was held that if the tenant do not exert his privilege and sever the fixtures before the expiration of his right upon the land, he cannot afterwards,

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because the right of the fixtures vests in the landlord at the same time as the right of the possession of the land. (*Hill on Fixtures*, § 45.) And although the landlord afterwards severs them, such severance does not revive the right of the tenant to the property. (*Taylor's Land. and Tenant*, § 553.) And the same doctrine is held in *King v. Wilcomb*, (7 Barb. 263.)

Cases are cited by the plaintiff's counsel to show that one man may own the land, and another the trees growing upon it; and that as between the landlord and tenant, fixtures erected by the tenant may be treated as personal property, although as between vendor and vendee they would be regarded as real estate. But this view of the law does not remove the main obstacle to the plaintiff's recovery. It does not determine that the tenant may treat such fixture as personal property, after his tenancy has expired. If the article were not a fixture, doubtless the tenant might take it away any time after his tenancy had expired; although he would be a transgressor for entering upon the premises without the consent of the landlord, in order to take it away. But when the property claimed is attached to the soil, so that it is to be regarded as a fixture, the rule seems to be well settled, that if the tenant neglects to take it away with him at the expiration of his term, or such further time as may be agreed upon for that purpose, the title to it vests absolutely in the owner of the reversion.

If I am right in this view of the law, the referee was right in his final conclusion, although he may have erred in the decision of some other questions not material to change the result.

I think the judgment should be affirmed.

Judgment affirmed.

[ONONDAGA GENERAL TERM, JANUARY 7, 1868. *Foster, Mullin and Morgan*, Justices.]

## JEROME S. PLUMMER vs. MICHAEL MURRAY and others.

Married women being permitted by the act of 1849, (ch. 375,) to make wills devising real and personal estate, the same statute which protects the after-born children of their husbands from wills made by such husbands, also protects the children of married women from wills made by their mothers previous to the birth of such children.

Hence children born after the making of a will, and not provided for and not mentioned therein, are to succeed as in case of the intestacy of the parent making such will, whether father or mother.

Accordingly, where a married woman, in 1861, being then childless, made a will devising real and personal estate to her husband, and afterwards had a child born, who survived her; *it was held* that such child, after her mother's death, was entitled to surplus moneys arising from the sale under a foreclosure, of the real estate devised, subject to the husband's life estate as tenant by the curtesy.

**M**OTION to confirm the report of a referee, as to the disposition of the surplus moneys arising on a mortgage sale.

The referee found that Albert Michel and Antoinette C. Michel were married in 1859. That in September, 1860, they had a child born, who died in the month following its birth. That in July, 1861, Antoinette C. Michel, the wife of Albert Michel, then being childless, made a will, by which she devised her property to her husband, she then owning real estate. That two children, Adaline Michel and Annette Michel, were born subsequently, and that Adaline, one of the children, died May 24, 1864, and after her mother, who died June 15, 1863. That Albert Michel, the testatrix's husband, and Annette Michel, her daughter, are still living. That the land which the testatrix died seised and possessed of, has been sold under a foreclosure sale, and that there is a surplus of \$2029.85. That the same was claimed by the husband of the deceased, as devisee, and by the surviving child as heir at law of her mother, subject to her father's tenancy by the curtesy therein. The referee reported in favor of

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the devisee under the will, and the infant, by her guardian, opposed the confirmation of the report.

J. F. BARNARD, J. Among the classes of persons prohibited by the Revised Statutes from making a will were married women. (2 R. S. 57, § 1.) It was provided by the statute that if, after the making of a will by a married man, he had a child born either in his lifetime or after his death, and he should die leaving such after born child unprovided for, and not mentioned in his will, every such child should succeed to the same portion of his father's real and personal estate as would have descended or been distributed to such child, if the father had died intestate. (2 R. S. 65, § 49.) In 1849, the disability to make a will was removed from married women, and they were permitted to devise personal and real property as if unmarried. (*Laws of 1849, ch. 375.*)

Laws *in pari materia* must be construed as if they formed parts of the same statute and were enacted at the same time. The words *in pari materia* are used as a phrase applicable to public statutes or general laws made at different times and in reference to the same subject. Such laws are to be construed together as forming a united system, and as one statute; otherwise the system might be unharmonious and inconsistent. The design is to carry out the intentions of the laws; and it is a rule that a code of statutes relating to one subject was intended by the legislature to be consistent and harmonious in all its parts and provisions.

The children of the only married person who could make a will at the enactment of the Revised Statutes were protected from being disinherited when born after the making of the will of such person and not provided for or named in it. If married women could then have made a will, the statute would have been construed to protect their children in like circumstances. Married

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 Bromley v. Walker.
 

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women can now make a will. The same beneficent statute protects their children which protects the children of their husbands. The system is one—the design is uniform. Children born after the making of a will, and not provided for and not mentioned in it, are to succeed as in case of the intestacy of the parent making such will, whether father or mother. There can be no discrimination made in favor of a husband, as devisee. He has no right against his child, except under the will, and if as to him that is good against after born children of their mother, it would be were a stranger the devisee.

The infant, Annette, is entitled to the surplus, subject to her father's life estate as tenant by the curtesy, and the report is sent back to the same referee for correction, in accordance herewith.

[KINGS SPECIAL TERM, February 3, 1868. J. F. Barnard, Justice.]

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 BROMLEY *et al.* vs. WALKER.
 

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The equities of a party who takes negotiable paper before maturity, in good faith, and pays for it, or pays part of the consideration therefor, by the surrender and extinguishment of the note or other security for a debt due to him from the assignor or previous holder of the paper transferred, are superior to those of the original maker or indorser of such paper.

Thus where V., the payee and indorser of a promissory note for \$200, made by the defendant, sold and delivered the same, before maturity, to G. for \$100 in cash, and his own note for \$100, held by G. for a previous indebtedness, at the same time giving his note for the interest on the note so surrendered, and G. taking such note made by the defendant in good faith and without notice; *Held* that these facts brought the case within the decisions in *Stettheimer v. Meyer*, (33 Barb. 216) and *Brown, Ex'r, &c. v. Leavitt*, (31 N. Y. Rep. 118,) and within the principle declared in *Young v. Lee*, (2 Kern. 554;) and that G. was a *bona fide* holder of the note so purchased by him.

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Bromley v. Walker.

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**A**PPEAL from a judgment entered upon the report of a referee.

The complaint was upon a promissory for \$200, made by the defendant Walker, dated May 1, 1866, payable three months after date, with interest, to the order of John P. Van Allen, which note Van Allen indorsed and transferred to one D. P. Garrison, who indorsed and transferred it to the plaintiffs. The defendant Walker, by his answer, alleges, 1st. That the plaintiffs are not, and D. P. Garrison is, the real party in interest. 2d. That the note was procured from Walker by fraud, is without consideration, which was well known to the plaintiffs, and they are not holders of the same in good faith or value. 3d. That the note was made by Walker and delivered to Van Allen for the purpose of raising money by the discount thereof, for the benefit of Walker, and Van Allen, before the note became due, made a usurious agreement with Garrison by which Van Allen agreed to deliver the note to Garrison and Garrison agreed to lend and advance to Van Allen, upon the faith thereof, \$100 and no more, and deliver to Van Allen \$100 in securities of no value; which agreement was made and securities were delivered as a cover and concealment of the real usury, and the loan or forbearance so secured exceeds the rate of seven per cent, wherefore the note is void; all which was well known to the plaintiffs.

The referee found the following facts: That the defendant executed the note in suit on the 1st day of May, 1866, and then delivered it to John P. Van Allen, the payee, without consideration. That Van Allen received the note with the understanding that he would procure the same to be discounted, and return the proceeds to the defendant to enable him to pay his own note then due at the bank of Ward & Brother. That the note in suit bears interest from its date. That some time after this, and before the maturity of the note, Van Allen sold and delivered it, by indorsement to Daniel P. Garrison, who paid



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him therefor the sum of \$100 in cash, and surrendered up a note for \$100 principal, which Garrison held against the said Van Allen, and taking back a scrip for the accrued interest thereon. That Garrison thus took the note without notice of its character or of the facts and circumstances attending its execution and delivery to Van Allen, or that the same was without consideration. That Van Allen paid the defendant no part of the proceeds of the note. That after the note had been so purchased by Garrison, and before he sold and delivered the same to the plaintiffs, he was informed by the defendant of all the facts and circumstances connected with the making and delivery of the note, and that it was wholly without consideration. That just before the maturity of the note Garrison agreed with one Burrill Spencer to sell and deliver to him the note, together with another note for about \$100, for the sum of \$300, and the said Spencer and Garrison then went to the office of the plaintiffs, none of the plaintiffs being present, when Spencer gave Garrison the plaintiffs' check for \$300, and took the two notes, which were left in the possession of the plaintiffs. That the plaintiffs were the purchasers of the note in and by the transaction between Burrill Spencer and the said Garrison, and took the same without notice and in good faith, and that Spencer, at this time, had no notice of the true character of the note or of the facts and circumstances connected with its execution and delivery to Van Allen.

As matter of law the referee reported that the plaintiffs were entitled to judgment against the defendant for the amount of the note, with costs.

The defendant Walker appealed from the judgment.

*D. Wentworth*, for the appellant. I. The plaintiffs must show that they received the note in the ordinary way of trade, in good faith and without notice. (9 *Wend.* 191. 4 *N. Y. Rep.* 166.) They not only fail to do so, but take

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the position that the duty rests with the defendant to prove the contrary. That production of the note is sufficient.

II. The plaintiffs are not the owners and holders of the note in good faith. They are mere holders. (37 *Barb.* 458.)

III. The referee places his decision upon the ground that the purchase of the note by Burrill Spencer was a purchase by the plaintiffs through Spencer as agent. This was error. There is not a particle of testimony to sustain the proposition that Spencer was the plaintiffs' agent, or had any business connections with them whatsoever. Indeed, the evidence is quite to the contrary.

*J. L. Requa*, for the respondents. I. The payment by Garrison of \$100 for the note in question, and the surrender of the \$100 note which he held against Van Allen, made Garrison a *bona fide* holder for value. The surrender of the \$100 note makes him a holder in good faith, the same as if he had paid that amount in cash instead of surrendering the note. (*Stettheimer v. Meyer*, 33 *Barb.* 215. *Brown v. Leavitt*, 31 *N. Y. Rep.* 113.)

II. If Garrison was a holder in good faith and for value, the plaintiffs are entitled to recover, irrespective of questions of their own good faith, because they stand in the right of their indorsee, Garrison. (1 *Par. on Cont.* 212. *Chalmers v. Lamon*, 1 *Camp.* 383. *Solomons v. Bank of England*, 13 *East*, 135. *Thomas v. Newton*, 2 *C. & P.* 606. *Hascall v. Whitmore*, 19 *Maine Rep.* 102.) All subsequent questions in the case are therefore immaterial.

III. But the plaintiffs are themselves holders in good faith and for a valuable consideration. (*Steinhart v. Boker*, 34 *Barb.* 436. *Magee v. Badger*, 30 *Barb.* 246; *affirmed*, 34 *N. Y. Rep.* 247. *Bank of New Haven v. Perkins*. 20 *id.* 554.)

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*By the Court, E. DARWIN SMITH, P. J.* If it was necessary to hold that the plaintiffs received the note in question from Garrison, in the ordinary course of business, and for value, I should have some doubts whether the finding of the referee on that point could be sustained. Spencer purchased the note of Garrison with the checks of these plaintiffs; but the plaintiffs affirmed the trade, and took the note, and have possession of it, and the money paid by Spencer for it, was their money.

From these facts, if Garrison could give a good title to the note, I think the referee might find the title in the plaintiffs, and that his finding on that point cannot be disturbed. They had all the title Garrison had, at least, and that is sufficient to maintain the action, if the defendant had no defense to it, as against Garrison.

The defendant clearly made out a good defense to the note, as against the original payee, Van Allen; but, according to the present tenor of the cases, I think he made out no defense, as against Garrison.

The referee finds that Garrison received this note of Van Allen before the maturity of the note; that Van Allen sold and delivered it to him, and received therefor \$100 in cash and his own note for \$100 principal, and upon his giving a note for the interest accruing on his note then surrendered; and that Garrison took the note in good faith, without notice of the facts, &c. This brings the case within the cases of *Stettheimer v. Meyer*, (33 Barb. 216,) and *Brown, executor, &c. v. Leavitt*, (31 N. Y. Rep. 113,) and within the principle decided in *Young v. Lee*, (2 Kern. 554.)

It is too late, after these cases in the Court of Appeals, to hold that the equities of the party who takes negotiable paper before maturity, in good faith, and pays for it, or pays part of the consideration therefor, by the surrender and extinguishment of the note, or other security, for a debt due to him from the assignor or previous holder of

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the paper transferred, are not superior to those of the original maker or indorser of such paper.

Garrison here paid \$100 in cash, and gave up and surrendered the note of Van Allen for \$100 besides. This made him a *bona fide* holder of the note in suit, and the judgment must, therefore, be affirmed.

Judgment affirmed.

[MONROE GENERAL TERM, March 2, 1868. *E. D. Smith, Johnson and J. C. Smith, Justices.*]

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MARTHA A. GARLINGHOUSE, vs. JOHN WHITWELL, sheriff, &c.

A party who claims that another, seeking to enforce his rights, shall not be permitted to allege and show the truth, must establish that he had been induced, by his faith in, or reliance upon, the assertions or acts of such party to the contrary, to do some act, or incur some liability, which would make it injurious to, or a fraud upon, him to allow such truth to be shown.

A party setting up an estoppel, must be personally misled or deceived by the acts which constitute the estoppel alleged; and he must have a particular interest in such acts, more than the public at large. He must have trusted to them, and confided in them, in some particular business transaction.

Nothing in the mode of conducting the business in a store—such as the name over the door, and on the window shades, newspaper advertisements, &c.—can operate as an estoppel, in respect to the ownership of the business and goods, as between a person claiming to be the owner and the plaintiff in a judgment recovered against a third person, before the commencement of the business in such store, or the sheriff, acting as the agent of such plaintiff, under an execution. The mode of carrying on a subsequent business cannot have influenced the giving of a previous credit.

The case of *Rigney v. Smith*, (39 Barb. 383,) commented upon and limited.

**A**PPEAL by the defendant from a judgment entered on the verdict of a jury.

This action was brought, under the provisions of the Code of Procedure, for the claim and delivery of personal

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property, consisting of liquors, casks, bottles, &c. The plaintiff is the wife of Leman B. Garlinghouse. Her husband has been for many years insolvent. The defendant is, and was when the alleged cause of action arose, sheriff of Ontario county. In 1854 Thomas Beals, deceased, recovered against Leman B. Garlinghouse a judgment in this court. In March, 1865, an execution was issued by the executor of Thomas Beals, upon that judgment, to the defendant. By virtue of this execution, the defendant, in March, 1865, levied upon the property described in the complaint. This property was in a store occupied by Leman B. Garlinghouse as a retail liquor store, having his sign in front of it, and his sign also on shades in the windows of it facing the street, in these words, "L. B. Garlinghouse, wholesale and retail liquor store," in large letters. Most of the liquor was in barrels, on tap, and he was selling from the barrels. Many of the barrels were marked on the head, in large letters, "L. B. Garlinghouse," and said L. B. Garlinghouse advertised the business in the newspapers in his own name.

The defendant justified the taking of the property, under said execution, as the property of the defendant therein, and alleged that the claim made by the plaintiff thereto was fictitious, false and fraudulent; and that such property belonged to L. B. Garlinghouse.

The action was tried at the circuit in Ontario county, on the 16th May, 1866, before his honor Justice WELLES, and a jury. After the proofs were closed, and the cause summed up to the jury by counsel on each side, his honor charged the jury, who found a verdict for the plaintiff, that she was entitled to the possession of the property, and that the value thereof was \$1200. An order was made by the court, that the defendant have time to make and serve a case and exceptions, and that the same be heard in the first instance at the general term.

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*C. J. Folger*, for the appellant.

*H. O. Chesebro*, for the respondent.

*By the Court*, E. DARWIN SMITH, P. J. The plaintiff clearly proved that the property in question belonged to her, and the jury have so found, upon the proper submission of this question to them. The exception that the question put to the witness Clark was improperly altered, is not, I think, well taken. The plaintiff was clearly entitled to the explanation given in answer to that question by the witness, showing how the license to sell liquors came to be given in the name of her husband.

Upon the question of estoppel, as the same was presented and discussed here, and at the circuit, it seems to me that the decision and charge of the circuit judge was entirely correct. The plaintiff, in the execution which the sheriff was seeking to enforce, cannot claim to have been misled by the manner in which the plaintiff's business was conducted, or to have contracted the debt for which the judgment was recovered, upon the faith of the representations or appearances at the plaintiff's store, exhibited to the public. The judgment of Mr. Beale, upon which the execution levied by the sheriff was issued, was recovered in 1854, and the plaintiff purchased this distillery property, and commenced operating it, in 1864, in the fall, ten years afterwards. The levy was made in 1865. The store was opened after the plaintiff purchased the distillery, and was supplied with liquors from such distillery, or the liquor manufactured at such distillery was sold at such store. Nothing in the conduct of the plaintiff, or her husband, in carrying on the said store thus opened, after 1864, could have induced Mr. Beale to contract the debt so put in judgment in 1854. So there is nothing in the case to raise the question of estoppel, as between the judgment creditor and the plaintiff in this

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suit; and the sheriff is merely the agent of the plaintiff in the execution, and has no new rights available to raise any question of estoppel, which did not, or do not, exist in favor of the plaintiff in the judgment he was seeking to enforce.

All the facts urged as evidence of an estoppel *in pais* were admissible, and were properly received upon the question of fraud. Whether this property, in fact, belongs to the plaintiff, or her husband, was properly litigated, and was a fair subject of inquiry on the trial, and this question was fairly submitted to the jury.

The case of *Rigney v. Smith*, (39 Barb. 383,) stands upon peculiar ground. The debt of the judgment creditor, in that case, was contracted while the defendant in the execution was still, apparently, in possession of the store where the goods levied on were found by the sheriff. On this ground, perhaps, this case can stand, but I do not see how, otherwise, it can be sustained. A party who claims that another, seeking to enforce his rights, shall not be permitted to allege and show the truth, must establish that he had been induced, by his faith in, or reliance upon, the assertions or acts of such party to the contrary, to do some act, or incur some liability, which would make it injurious to, or a fraud upon, him to allow such truth to be shown. A party setting up an estoppel must be personally misled or deceived by the acts which constitute the estoppel alleged; and he must have a particular interest in such acts, more than the public at large. He must have trusted to them, and confided in them, in some particular business transaction.

Had Mr. Beale, the judgment creditor, trusted to the appearance shown in respect to the occupation by Garlinghouse of the store in question, and sold him goods, or contracted any other debt, in the belief, from such appearances, that he was the owner of the store, then the plaintiff, and all other persons, I think, would be estopped

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from showing the contrary. But there is none of that kind of proof in the case, and I do not see how any estoppel can be set up or alleged against the plaintiff, to prevent her showing how the facts are in respect to the ownership of the property in question. She has not misled the judgment creditor by any act of hers, nor has she permitted any act to be done which has misled him.

Within the case of *Buckley v. Wells* (33 N. Y. Rep. 518) and *Knapp v. Smith*, (27 id. 277,) I do not see why the plaintiff was not entitled to recover, independently of the question of fraud. This question was submitted to the jury, and fairly tried, and I do not think there is any ground for a new trial on that question.

A new trial should, therefore, be denied.

New trial denied.

[MONROE GENERAL TERM, March 2, 1868. E. D. Smith, Johnson and J. C. Smith, Justices.]

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CARROLL vs. S. & S. H. MIX.

Where a bailee of goods absolutely refuses to deliver them to the owner on demand; or denies his right to them; or assumes to be himself the owner; or interposes an unreasonable objection to delivering them; or exhibits bad faith in regard to the transaction; a conversion of the property may be inferred.

But where the defendant received goods from B. without knowing who was the owner, but having every reason to suppose B. to be the owner, and, on demand being made by a third person claiming to be the owner, did not set up any claim to them, nor dispute the claimant's right, but stated, in substance, that he did not know the claimant was the owner; that the property was left by B., and that he desired the order of his father, or B. before delivering the same; or an opportunity to confer with his father in regard thereto; *Held*, that this was not such a refusal as amounted to a conversion of the goods.



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THIS is an appeal by the defendants from a judgment of the county court of Albany county, affirming a judgment of the justices' court of the city of Albany.

*R. W. Peckham, Jr.* for the appellants.

*W. A. Allen*, for the respondent.

*By the Court*, INGALLS, J. The defendants sold to one Blatner a box of glass. The plaintiff was doing the carpenter work of a building for Blatner, and discovering that the glass did not fit, it was agreed between Blatner and the plaintiff, that the latter should furnish glass that was suitable and take the glass in question in exchange therefor, and the plaintiff did so provide the glass, and left the box of glass in question in the building. The defendants, by the direction of Blatner, took back the box of glass to the store and the plaintiff called for and demanded the same of Stephen H. Mix one of the defendants. The plaintiff states the interview as follows: "Saw Stephen H. Mix there; said I came after my box of glass; he said what box of glass? I said, the one belonging to me that was in Blatner's building; said I was informed he had taken it; he said he had taken it away; asked him if he would please give it to me; said not unless I would get an order from Blatner, or his father; I said I did not want to lose time going after Blatner or your father for an order for my property."

On a cross-examination, the plaintiff further testified, "I left the one in question (box glass) at Blatner's; Mix said if I got an order from Blatner, I might have them; he said he took them from Blatner's, did not know who they belonged to."

Stephen H. Mix testified: "It (the glass) was taken by direction of Blatner; when the plaintiff came there I did not know he had any thing to do with it; so told him;

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I told him the glass was there by request of Blatner; if he would get an order from Blatner, I was willing to give it to him; I told the plaintiff I did not know any thing about his owning it; he said if *I did not your father does*; I said if father was there, and said so, I would let him have it; we furnished Blatner the glass in the first place." It is obvious that the defendants acquired possession of the glass in question from Blatner from whose house it was taken by the defendants without any knowledge that the plaintiffs had any claim thereto, and the defendants had every reason to suppose that Blatner was the owner thereof. When the plaintiff demanded the glass, Mix did not set up any claim to it, nor did he dispute the plaintiffs' right, but merely stated, in substance, that he did not know the plaintiff was the owner; that it was left by Blatner, and that he desired the order of Blatner or his father before delivering the same, or an opportunity to confer with his father in regard thereto. This was certainly a reasonable request, and Mix was not bound to part with the possession of this property acquired by him in the manner aforesaid, without some evidence of the plaintiffs' title, or an opportunity to acquire some information in regard thereto. He had every reason to believe that Blatner was the owner of the glass; it was originally sold to him, and by his request taken back into the possession of the defendants from Blatner's house, subject to his demand. If the defendant Mix had absolutely refused to deliver it to the plaintiff; or had denied his right to it, or had assumed to be the owner of it; or had interposed an unreasonable objection to delivering it; or had exhibited bad faith in regard to the transaction, a conversion of the property might have been inferred. We are clearly of opinion that the plaintiff failed in this particular. In Monnot v. Ibert, (33 Barb. 24,) Justice EMOTT remarks: "It is true the authorities require that the refusal should be absolute and not evasive. But this means that it should

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not be a mere excuse or apology for not complying immediately, as when the demand is made by an agent, and the other party wishes to verify his authority before complying, or of an agent who must consult his principal. *If such excuses are made in good faith, they will not amount to a refusal for which trover will lie. There must be an absolute denial of the plaintiff's right, or the qualifications must be unreasonable, or made in bad faith.*" (See also *Holbrook v. Wight*, 24 Wend. 169.) Cowen, J. at page 177 remarks: "So of any reasonable excuse made in good faith at the time, the goods being evidently kept with a view to deliver them to the true owner. It is then the business of the plaintiff to obviate the objection as far as may be reasonably required." (See also *Tuttle v. Gladding*, 2 E. D. Smith, 157; 1 *Wait's Law and Practice*, 830.) The case at bar is clearly within the principle established by the authorities cited, and the rule thus adopted is reasonable and just, and the plaintiff should have acted upon it, instead of exhibiting such inexcusable haste in commencing an action against an innocent party.

The judgment of the county court and of the justices' court must be reversed, with costs.

[ALBANY GENERAL TERM, March 2, 1868. *Ingalls, Hogeboom and Peckham, Justices.*]

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 THURBER vs. CORBIN, impleaded with Jenkins.

The plaintiff, a member of a partnership firm, sold out his interest to J. for \$5000, and the new firm, bearing the same name, assumed the company debts. To secure the plaintiff for his liability on account of these debts, J. executed his bond to the plaintiff, with the defendant C. as his surety, by which they bound themselves "to pay so much of the debts of the old firm as the plaintiff was or should in any event become liable to pay."

*Held*, 1. That on the dissolution of the old firm and the formation of the new one, the members of the new firm became the principal debtors, and, as

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between the members of the two firms, were primarily liable to pay the debts of the old firm.

2. That a note, on time, given by the new firm, to pay an old debt, and accepted by the creditor, with knowledge of the change of membership, was a satisfaction of such debt.
3. That regarding the note as given in the name of the old firm, by one of the new members, the plaintiff was not liable as one of the makers, unless he assented to it; and if he did assent, it was such a change and postponement of the original debt as to discharge the surety.
4. That the plaintiff, having a valid defense to the note, could not, without notice to the surety, allow it to pass into judgment against himself, and then, by paying it charge the surety.

**A**PPPEAL from a judgment entered upon the report of a referee.

The action was brought to recover certain sums due to various persons from the firm of "Thurber, Rice & Co." and which the defendants had assumed to pay and discharge by their bond of indemnity executed to the plaintiff, March 24, 1865, the plaintiff on that day having sold out his interest in said firm to the defendant John T. Jenkins for \$5000, subject to the payment of the company's debts; and the defendant Justin Corbin having signed said bond as security, by which the defendants agreed "to pay so much of the debts and liabilities of Thurber, Rice & Co. as the said Ira A. Thurber is or may in any event become liable to pay," \* \* and "to pay up and discharge all said debts and liabilities as fast as the same shall fall due," with a further agreement to save the plaintiff harmless.

The referee reported, among other things, that the firm of "Thurber, Rice & Co." owed certain debts, and which were assumed by the new firm (of Thurber, Rice & Co.) and so far as the plaintiff was concerned, the defendants were to indemnify and save the plaintiff harmless therefrom; that he had paid, as a member of the old firm of Thurber, Rice & Co. and is liable to pay, certain debts of the firm, which the defendants had assumed to pay, but

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which they had not paid, and which were outstanding at the time of the sale, viz :

A debt to Van Horn paid by the plaintiff October 9, 1866, . . . . .	\$556 88
Interest thereon, \$47.63, . . . . .	47 63
Ira H. Cobb's debt, . . . . .	400 00
Interest thereon from 20th January, 1865, less \$159.36, received by the plaintiff out of the firm debts. The amount advanced October 6, 1866, by the plaintiff, \$278.75, which, with interest amounts to . . . . .	302 83
The Hotaling judgment, \$566, January 20, 1867, which, with interest, including sheriff's fees, \$11.13, now amounts to . . . . .	615 64
Pinckney judgment, May 14, 1867, \$548.47, which, with interest, amounts to . . . . .	598 11

The whole amount found due the plaintiff is \$2121.09, for which judgment was ordered for the plaintiff.

The defendants excepted to the finding of the referee in relation to the Hotaling judgment and the Pinckney judgment, as well as to the general conclusion of the referee finding the whole amount due, as stated in his report.

The facts in relation to the two claims objected to are stated in the opinion of the court.

*William C. Ruger*, for the appellant.

*Richard Raynor*, for the respondent.

*By the Court*, MORGAN, J. The complaint fails to specify any particular demands which the plaintiff paid of the debts of the old firm of Thurber, Rice & Co. It is stated in the complaint that the defendants did not perform their agreement, but neglected to pay the debts of the old firm,

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or to save the plaintiff harmless therefrom according to the terms and conditions of their said agreement, in consequence of which the plaintiff "has been compelled to raise and advance money to pay up and discharge many of such debts and liabilities and to continue under and oppressed with the debts and liabilities of said firm to his great damage and injury." The plaintiff thereupon "demands judgment for \$3000 and costs," &c.

To this the defendant, among other defenses not necessary to notice, interposed a general denial.

It is in vain, therefore, to look into the pleadings for any information as to the particular debts paid by the plaintiff, or which he was liable to pay at the time of the commencement of this action. On recurring to the testimony of the plaintiff, we have his statement that there were outstanding debts of the old firm at the time of the sale, among which he enumerates the following, viz: "The firm owed Abram Van Horn, of Utica, June 29, 1867, \$587.73."

It will be seen that the referee allowed the plaintiff for paying a debt to Van Horn, October 9, 1866, viz. \$556.88, principal, and \$47.63 interest. How this could be an outstanding debt as early as March 24, 1865, or the same debt as that of June 29, 1867, may admit of some question; but as there is no exception to this item, we ought perhaps to assume that there was some evidence of its existence as early as March 24, 1865, and that the subsequent dates and amounts were only intended to indicate what the debt amounted to at these several times.

The plaintiff also specified the following as an outstanding debt against the old firm, March 24, 1865: "Ira H. Cobb, Jan. 20, 1865, \$400 and interest."

There seems to be no valid objection or exception to the allowance of this claim or to the Pinckney judgment, so called. The plaintiff states that the old firm owed a debt to Pinckney, March 4, 1865, amounting to \$415. There is nothing stated in the finding to show on what account the

plaintiff was allowed \$302.83 for moneys advanced, including the interest. If there is any thing in the evidence which explains it, it has escaped my attention ; but as there is no objection made to its allowance by the defendant's attorney, I think we are not called upon to disallow it on appeal.

This reduces the questions to one only, and that is in relation to what is called the "Hotaling claim," which the referee allowed to the plaintiff, denominating it the "Hotaling judgment, \$566, Jan. 10, 1867," which with interest, including sheriff's fees, amounted to \$615.64, at the date of the referee's report.

The plaintiff states in his testimony, among other outstanding debts, "Garret Hotaling, Jan. 27, 1861, for \$569," and he says he "paid that \$566 Jan. 10, 1867." In another place he states that Hotaling had the note of the new firm. Next the judgment roll is produced, by which it appears that the Syracuse City Bank recovered a judgment against the members of the old firm, including the plaintiff as well as Garret Hotaling, for \$467.93, November 17, 1866, upon a note purporting to have been made by Thurber, Rice & Co. March 11, 1865, payable to the order of G. H. Hotaling at the Salt Springs Bank, sixty days after date, and indorsed by Hotaling. The plaintiff put in an answer in that suit, containing a general denial only, and the action was tried before the court without a jury, the plaintiff failing to appear. An execution was issued, and the plaintiff actually paid it January 16, 1867, although by some arrangement among the parties, the execution was not satisfied. The plaintiff testified that he had no legal defense against the note, and the referee finds that neither of the defendants had notice of the suit.

The defendant, John T. Jenkins, testified that the note prosecuted by the Syracuse City Bank was given to Garret Hotaling *after* March 25, 1865, and that he made and signed the note, and when he signed it, he notified Hotaling that

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the new firm had been formed and that the plaintiff was out of it; that his indebtedness against the old firm was an open account. To add confusion to the case, he then states that three notes were given at the same time, on the first of April 1865, dated at different days, so as to make their payment easier. The only solution to this statement is, that the note sued by the Syracuse City Bank was one of them, the others having been paid by the new firm. But the referee has a finding in which he states that on the *first day of April, 1865, the Hotaling debt "was put into three several notes signed by the new firm of Thurber, Rice & Co. of which Jenkins was a member, by John T. Jenkins, one of their members, (who had no authority to sign for the old firm,) and his account was thereupon receipted; that said Hotaling knew of the change in said firm, and that said note was transferred to the City Bank, which sued Ira A. Thurber thereupon, and obtained judgment against him by default."*

This is not strictly correct, as it appeared in the judgment roll produced on the trial, that Ira A. Thurber put in a defense under which he might have successfully defended the note, if it was executed in the name of the old firm, without his knowledge or consent, or if it was executed as the proper note of the new firm.

It is impossible to be satisfied with the conclusion of the referee, that this note was intended to be the note of the new firm instead of the old one, for it is *dated back to the time of the existence of the old firm*, which is hardly reconcilable with the conclusion that it was intended to be the note of the new firm. But in neither aspect of the case would the surety of John T. Jenkins be liable to the plaintiff upon the note in question. It is not enough to be able to show that Jenkins has made himself liable upon the note by assuming to execute it on behalf of the new firm.

The surety is only bound to pay it while it remains the proper debt of the old firm. If it was accepted by Hotal-



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ing as the note of the new firm it discharged the debt, as against the old firm, and Ira A. Thurber had a perfect defense to it. If it was executed by Jenkins as the note of the old firm, Thurber was not liable to pay it, unless he assented to it. There is no evidence that he ever assented to it; but if he did assent to it, it was such a change and postponement of the original debt as to discharge the surety. Thurber had no right to give a new obligation extending the time of payment of the old firm debts, although done with the consent of the creditor. Such an act would doubtless discharge the surety, unless he also consented to it. Doubtless the bond obliged Corbin to pay the original debt as to Ira A. Thurber, but we do not know what that was. On the dissolution of the firm, and the formation of the new one, the members of the firm became the principal debtors and were previously liable, as between themselves, to pay the Hotaling debt. They either satisfied it by giving their own note, or they undertook to secure it by giving a note, on time, in the name of the old firm.

If the plaintiff assented to this arrangement, in either form, and Corbin did not know of it, or assent to it on his part, then I am of opinion that he thereby discharged Corbin from his obligation to pay it. If the plaintiff did not know of it, or assent to it in either form, then he should have interposed his defense, or at least have notified Corbin that he had a good and sufficient defense to the note so that Corbin might have had the benefit of it in that suit.

There is only one aspect of the case in which the defendant Corbin could be made liable for the demand secured by the new note in question, and that was for Hotaling to surrender the same upon grounds which would have authorized him to recover upon the original indebtedness.

The defendant Corbin never undertook to pay any thing else. As it is now too late to repudiate the new note and

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*Harvey v. Large.*

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recover upon the original claim, I think the defendant Corbin is discharged from its payment.

It is to be regretted that there should be so much confusion and uncertainty in cases which come before us for review. There is no statement in the pleadings which would enable the court to see what demands the plaintiff expects to recover; and the findings of the referee which are generally drawn up by the successful party, fail to point out the grounds upon which the Hotaling debt, so called, was allowed.

I have examined the evidence and findings with as much care as I could, and have stated the results, I believe, with entire fidelity to the facts as they appear in the case. The result is, that the judgment is erroneous in the particulars above mentioned, and should be reduced accordingly; or if the plaintiff will not consent to modify it, then a new trial should be granted, with costs to abide the event.

In case of a modification by deducting the amount of the Hotaling debt, so called, the judgment as thus modified should be affirmed, without costs of appeal to either party.

Ordered accordingly.

[OHIOKIDAGA GENERAL TERM, April 7, 1868. *Foster, Mullin and Morgan*, Justices.]

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THOMAS HARVEY vs. WILLIAM LARGE, by Henry Blacker,  
his guardian.

A justice of the peace has no jurisdiction to proceed in an action against an infant defendant after service and return of the process, until a guardian has been appointed. Until this has been done, he has no right to receive the complaint of the plaintiff, or the answer of the infant defendant.

If the infant does not apply for the appointment of a guardian, the plaintiff should apply, and see to it that a guardian is properly appointed.

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Where an infant, sued in a justices' court, does not plead his infancy, but proves it on the trial, the proper judgment for the justice to render is a judgment of dismissal, stating the reason, viz. that the defendant is an infant, and that no guardian has been appointed. If he renders a judgment against the defendant it will be void.

Where such a judgment of dismissal is rendered, the proceedings in that action will not be a bar to a second action.

**T**HIS action was commenced in a justice's court, to recover damages arising from the negligence of the defendant occasioning the death of the plaintiff's horse. It was tried March 11, 1867. The defendant, by his guardian, among other defenses, pleaded a former action, for the same cause, and judgment, in bar. In the former action, the defendant appeared without a guardian, and on the trial proved his infancy, and it was claimed in his behalf that no judgment could be rendered against him. He had not pleaded infancy, but other matters of defense. The justice took time to consider, and within four days entered "a judgment of discontinuance on the grounds defendant is an infant, and no guardian appointed." The present action was tried upon its merits. The defense of the former action and judgment was overruled, and the plaintiff had a verdict and judgment in his favor, and upon appeal by the defendant, the Erie county court reversed the judgment, upon the ground that the former action and judgment were a bar to that action. The plaintiff appealed to this court.

*James A. Allen*, for the plaintiff.

*Wm. C. Johnson*, for the defendant.

*By the Court*, MARVIN, J. By the justices' act, "any defendant in a suit, except persons under twenty-one years of age, may appear and defend the same in person or by attorney." "After the service and return of process against an infant defendant, the suit shall not be any

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further prosecuted until a guardian of such infant be appointed." (2 R. S. 232, §§ 41, 42.)

The justice has no jurisdiction to proceed in an action against an infant defendant after the service and return of the process, until a guardian has been appointed. The justice has no right to receive the complaint of the plaintiff, or the answer of the infant defendant. The first proceeding, after the return of the process, is the appointment of a guardian. If the infant does not apply for such appointment, the plaintiff should apply, and see to it that a guardian is properly appointed. In *Mockey v. Grey*, (2 John. 192,) the judgment was reversed upon the sole ground that the infant defendant appeared by attorney and not by guardian. It does not appear that there was at that time any statute upon the subject. The court say it is error in all other courts for an infant to appear by attorney, and there is no reason why the same rule should not apply to a justice's court. It appears by the revisers' notes that the provisions above quoted were *new*, in the Revised Statutes; and I think by the statute the court, after the service and return of the process, has no further jurisdiction in the suit until a guardian for the defendant is appointed. In the first action the defendant did not plead his infancy, but upon the trial he caused it to be proved, and the justice made the proper disposition of the action by dismissing it, stating the reason, viz. that the defendant was an infant, and that no guardian had been appointed. If the justice had rendered judgment against the defendant, it would, I think, have been void. See *Clapp v. Graves*, (26 N. Y. Rep. 418,) and the cases therein cited, in which the distinction between irregularities and nullities is considered. (See also *Sagendorph v. Shult*, 41 Barb. 102.)

The proceedings in the first action were not a bar to this action. The justice entered in his docket "judgment of discontinuance." He gave no judgment for costs. He

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understood that he had no jurisdiction to try the cause in the absence of a guardian for the defendant. If he had understood this at the time the infancy of the defendant was proved, I think he could then have arrested the trial, and appointed a guardian, and commenced the trial *de novo*, and that such proceeding would have been regular.

I concur with Mr. *Wait* in his *Law and Practice* in justices' courts, (vol. 2, p. 232,) that if the plaintiff is uncertain whether the defendant is an infant, and such defendant does not apply for the appointment of a guardian, it will be the best course for the plaintiff to see that a guardian is appointed. It can do no harm, in any case, and if the defendant is an infant, it is indispensable to the validity of a judgment.

The counsel for the defendant has raised some other objections to the judgment in the justice's court, but they are untenable. The judgment of the county court, reversing the judgment of the justice's court must be reversed, and that of the justice's court affirmed.

[ERIE GENERAL TERM, May 4, 1868. *Daniels, Marvin, Davis and Barker, Justices.*]

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SARAH N. McCAY and WILLIAM S. McCAY, by A. J. McCall, their guardian, *vs.* MARVEL WAIT.

Although the common law doctrine of *waste* is not, in its strictness, applicable to the condition of things in this country, such a cutting of trees or timber by a tenant as will work a permanent injury to the freehold or inheritance, in the absence of any specific leave or license to cut such trees or timber, is *waste* for which an action will lie, in equity, for the prevention of such injury, by injunction, before it is committed, or at law, for the recovery of damages, by the remainder-man, after the injury is done.

Whether the cutting of trees and timber in any case is such an injury to the inheritance, or not, is necessarily a question of fact for the jury, or the court, when the action is tried by the court, without a jury.

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**T**HIS is an action to recover for waste, alleged to have been committed by cutting timber, and was tried without a jury at the Steuben circuit, in November, 1866, a trial by jury having been waived by the parties. After hearing the evidence of the parties and the arguments of their counsel, the court found the following facts:

1st. That William W. McCay, deceased, was in his life time seised in fee of a farm situated in the village of Bath, New York, lying between Morris street, in said village, and the Conhocton river, containing about eighty acres.

2d. That said William W. McCay died in 1852, leaving a will by which he devised about thirty acres off the west end of said farm to his wife, and the residue to his son, William B. McCay, during his life, and after his death to the heirs of the said William B. McCay in fee.

3d. That said will was duly proved before the surrogate of the proper county, on or about the 6th January, 1853.

4th. That soon after the death of the said William W. McCay, the said William B. McCay took possession of the said premises so devised to him. That on the first day of November, 1858, the said William B. McCay leased the premises devised to him as aforesaid, for the term of five years from the 1st day of April, 1859, to the said defendant, who entered upon and took possession of the same under said lease. That on 31st December, 1851, William Hornby recovered a large judgment against said William B. McCay, on which an execution was issued to the sheriff of Steuben county, who, by virtue thereof, sold the life estate of said William B. McCay in said premises, to the defendant. That on the 13th June, 1862, the sheriff conveyed the life estate of said William B. McCay in the premises in question to the defendant, and that said defendant continued in possession of the same.

5th. That the said William B. McCay is now living. That the plaintiffs are his only children, and are the grand children of the said William W. McCay, deceased. That

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the plaintiffs are seised of an estate, in remainder, in the premises in question.

6th. That William W. McCay, shortly before his death, had conveyed about two and one half acres off from the northeast corner of said farm, for the purposes of a cemetery. That on the south and west of such cemetery was a piece of standing timber, which, with the cemetery, was in the form of a parallelogram. That the south and west sides of said timbered land were straight and smooth; the east side being on the east line of the farm, and that there were about four rods of this timber land fronting on Morris street. That there were six acres in this piece of standing timber; that the same had been set apart, kept and preserved a great many years, and was known as the "Grove." That it had never been used as a wood lot, except that when a tree had blown down it was cut up and taken off. That this timber lot or grove was kept clean, and had been used for pic nics and other public purposes, and was an ornament and benefit to the farm; that there was no other timber or wood on the farm, except a few trees on the bank of the river. That just west of the grove was a strip of cleared land, and west of that a swamp of two or three acres, and some village lots.

7th. That in March, 1864, the said defendant, while in possession of the premises in question, as aforesaid, wrongfully cut and destroyed, and converted to his own use, all the timber on the north part of said grove, standing adjoining and south of Morris street, in said village, and extending as far back as the south line of said cemetery, covering about two acres, thereby disfiguring the premises in question, and materially injuring the inheritance. That thus cutting the timber on the front part of said grove was a greater injury to the premises in question than if the same quantity of timber had been cut from the back part of said grove. That the defendant did not pull the stumps of the timber after taking off the same. That the

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timber thus cut as aforesaid was second growth oak. That the market value of the same was sixty dollars, at the time of cutting the same.

As conclusions of law, the judge found,

1st. That the defendant, in cutting and destroying the timber, as aforesaid, committed waste on the premises in question, of which the plaintiffs are seised of an estate of inheritance.

2d. That the plaintiffs are entitled to recover of the said defendant, for the same, the sum of \$60, with interest from the first day of April, 1864; and he directed judgment to be entered in favor of the plaintiffs, and against said defendant, for that sum, with costs.

The defendant appealed from the judgment so entered.

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*D. Rumsey*, for the appellant. I. The main question in this case is, whether, upon all the facts, the defendant is guilty of waste. It is probably true that he has been guilty of a breach of good taste in cutting this timber; but we insist at the outset, that the question of good or bad taste has nothing to do with the matter. And it seems very clear that if the question can be reduced to the simple one of the legal rights of the parties, there remains no principle upon which this judgment can be sustained. 1. The timber was all used for the purposes of the farm, for fuel, fencing and repairs. A tenant for life has a right to cut timber for each of these purposes; and Wait was here tenant for the life of W. B. McCay. (2 *Black. Com.* 122. *Jackson v. Brownson*, 7 *John.* 227. *Bacon Ab. title Waste*, c.) 2. Sufficient wood was left for all of the purposes of the farm, and there was no other wood on the farm. So the court finds. In this country, the tenant for life may clear land for the purpose of cultivation, as was done here, and if he leaves timber enough for all the purposes of a farm, it is not waste. (*Jackson v. Brownson*, 7 *John.* 227. *Kidd v. Dennison*, 6 *Barb.* 9.



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*Bingham on Real Estate*, 578. *Van Deusen v. Young*, 29 *N. Y. Rep.* 9) Here the defendant cut timber for a lawful purpose, and the cutting could not have been waste, even under the strictness of the English rule. As there was no other wood on the farm, the defendant had a right to cut so much as was necessary for fuel, provided he left enough for the uses of the farm. He cannot be compelled to buy firewood, while the premises furnish a supply of wood suitable for that purpose. There is no pretense that he cut any more than was necessary for these proper purposes. The pretense of W. B. McCay that the ash, elm, sycamore and butternut trees along the bank of the river should be cut for wood, is simply absurd.

II. The ornamental character of these trees has nothing to do with the questions in the case. While the books contain the general doctrine that it is waste to cut "ornamental" trees, it will be found on examination that the trees referred to, are trees standing "in defense or safeguard of the house," or trees standing in ornamental grounds in direct proximity to the mansion house, or isolated trees serving for shade or shelter, as in a doorway, or on a lawn. But none of these references to ornamental trees can be applied to a body of native timber covering seven or eight acres. These trees were not ornamental to the farm. They were ornamental to the village, perhaps, and cutting them may have lessened the attractions of Morris street. All the witnesses on that subject speak of it in connection with the cemetery and the street. But the injury to the cemetery or to the public is not the ground of this action. It was not connected with the dwelling house or the farm, and was not, in fact, in sight from it.

It needs neither argument nor authority to prove that the life tenant is entitled to take the necessary fuel, fencing stuff, &c. off the land. In doing this he may cut any trees growing on the land save *ornamental trees*. What are

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ornamental trees? In *Coffin v. Coffin*, (1 *Jacob's Ch.* 71,) the lord chancellor says: "The court does not protect timber because it *is* ornamental, but it protects it *if it was planted for ornament*, whether it is or is not ornamental." In *Tamworth v. Ferrers*, (6 *Vesey, Jr.* 419,) the court held ornamental trees to be those which were planted or growing there for the protection or shelter of the several mansion houses belonging to the estate, or for the ornament of said houses, &c. In *Burges v. Lamb*, (16 *Vesey, Jr.* 183,) Lord Chancellor Eldon, says: "At least the timber must be described not as ornamental merely, but as planted and growing for ornament." On page 185 he says: "The application of that principle to a wood covering thirty acres is carrying it to an extent of which I do not recollect an instance, and I cannot admit it is wiser to extend than to confine these injunctions." In *Day v. Merry*, (16 *Vesey, Jr.* 375,) the trees were planted to exclude objects from view. In all these cases it is evident that ornamental trees are such only as were planted or kept for the protection of the manor house on large estates, and intended only for ornament. It has never been held to extend to an ordinary wood, no matter how pretty it may look. That the trees cut in this case were not kept solely for ornament, is evident from the fact that it was part of the original forest, and not planted; that Mr. McCay when he wanted wood, &c. had cleared a part of the same grove; that he had sold another portion of it for a cemetery; that this was not near the mansion house for its protection; that it was the only wood on the farm for the use of the farm; and it is entirely evident from the case that holding this wood lot as ornamental trees, simply because it was pretty, would be an abuse of the rule of law and have the direct effect to deprive the tenant for life of one of the essential rights connected with his estate.

Nor can the manner in which the McCays treated this timber affect the question. A wealthy owner was at

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liberty to consult his tastes or those of his neighbors, but could not, by his action, bind any one coming after him. A man of large wealth might, if he chose, permit thousands of dollars to lie idle, in despite of all ideas of thrift or prudence. If such an owner regards a field of daisies more beautiful than one of corn, is his successor prohibited from plowing and planting something useful? Yet once allow the question of taste as a criterion, and the one proposition is as reasonable as the other. Men will differ on the question, according to their ideas, as to how far a regard for appearances should overcome considerations of thrifty management of property, so as to make it pay. But the elder McCay did not, in fact, preserve the timber. He cleared off and reduced to cultivation several acres in the rear, and also a part in front, just where the defendant cut, and afterwards disposed of nearly the whole remaining front for a cemetery, and this last was only a year or two before his death, for he died in 1852, and the cemetery was not laid out until 1851. Whatever he did or omitted to do before the cemetery was laid out, he did then sell all the ornamental part, and nobody knows what he would have done after that, had he lived. This is not a question as to the acts of a tenant for life of this grove, simply, but of the tenant for life of this farm. This was to all intents and purposes a farm, as much as if it had been four miles from a village; and the tenant is not subject to any rule of law different from that applicable to any other farmer. Would the owner of a farm, the owner in fee simple of land worth \$150 per acre, keep such land for the purpose of raising timber in competition with the forests around him? Certainly not as a matter of good husbandry.

Nor does the fact that the farm would be worth more with the timber on than with it off, affect the question. If the tenant had a right to cut the timber, then the fact that it diminished the value of the land, is immaterial,

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and if, on the other hand, he had no right to cut it, it would be waste, although the value of the land was increased. (*McGregor v. Brown*, 6 *Seld.* 114. *Van Deusen v. Young*, 29 *N. Y. Rep.* 9.) And this proposition necessarily excludes the whole question of ornament, pic nics and cemeteries.

The judge finds that by cutting the timber in front, the premises were injured in a greater degree than if the same quantity had been cut in the rear. This must be so, if at all, because it ornamented the street and cemetery, for it was the same kind of timber, and was an outlying portion which, being cut, left all the timber in one body. The fact itself is immaterial, for if the defendant had a right to cut off timber at all, he had a right to exercise his discretion as to where he would begin. At all events, a mistake in that respect would not make him liable, nor does the court give judgment on that ground. The judgment is for the whole value of all the timber cut.

III. The court erred in overruling the objection of the defendant, to evidence of the value of the farm with these trees on. 1. The evidence was entirely immaterial. The question is not whether the farm was worth less or more, but whether this timber was such that the defendant had a right to cut it for fuel and fences. 2. It was not competent on the question of damages. (*McGregor v. Brown*, 6 *Seld.* 114. *Van Deusen v. Young*, 29 *N. Y. Rep.* 9.)

For this error a new trial should be granted.

*C. F. Kingsley*, for the respondents. I. The plaintiffs were seised of an estate in remainder, in the premises, and were the proper parties to bring this action. (*Van Deusen v. Young*, 29 *N. Y. Rep.* 9. 4 *Kent's Com.* 231.)

II. Waste is a spoil or destruction in houses, gardens, trees or other corporeal hereditaments, to the disherison of him that hath the remainder or reversion in fee simple or fee tail. (2 *Black. Com.* 282. *Co. Litt.* 53.) 1. The

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tenant destroyed trees which he cannot produce. This is disherison. The estate in remainder is wasted. (*Livingston v. Reynolds*, 26 Wend. 122. *Kidd v. Dennison*, 6 Barb. 9.) 2. Oak, ash and elm are in all places considered timber, and cutting them is waste. (2 *Black. Com.* 282. 1 *Greenleaf's Cruise*, 121.) 3. The timber was white, black and red oak, and the majority alive. Seldom a tree dies entirely. There were 242 trees cut, averaging from seven to twenty inches in diameter. They were all live trees; the stumps had all sprouted. 4. The defendant sold three cords of the wood, which he had no right to do. (*Sarles v. Sarles*, 3 Sandf. Ch. 601.)

III. The defendant claims that he cut this wood for fire bote. He was bound first to cut the dry, fallen, or perishing wood (which he did not do.) (*Jackson v. Brownson*, 7 John. 236. *Clark v. Cummings*, 5 Barb. 339.) 1. He should have cut the wood from the rear of the grove, where all the witnesses agree it would have been a less injury to the place than cutting them where he did. 2. If the defendant had a right to cut this timber for fire bote, he would have had to cut it all down to have kept him in wood during the time he occupied the same, and when the plaintiffs came into the possession, there would not have been a stick of timber or a tree on the farm. 3. The defendant was not entitled to fire wood from the farm if taking the same was an injury to the inheritance. (*Gardner v. Dering & Hempstead*, 1 Paige, 573.) 4. To what extent wood and timber may be cut is a question of fact for the jury to determine. (*Bouvier's Law Dictionary*, title Waste, 644. *Jackson v. Brownson*, 7 John. 227.) The court below has found, as a question of fact that cutting this timber by the defendant disfigured the premises and was a material injury to the inheritance, and therefore waste, by the decision of *Gardner v. Deering and Hempstead*, (1 Paige, 573.) 5. It was never intended that the defend-

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ant should get his fire wood from this. It had been set apart, kept and preserved for thirty or forty years, by the testator, W. W. McCay, and was known as the grove, and never had been used for a wood lot. 6. The defendant did not cut any of the timber except the dead trees, till 1864, when he heard W. B. McCay was in the army, and there was danger of losing his life estate.

IV. The defendant also claims that he intended to fit the land for cultivation. This he did not do, but kept the same a year and then sold wood to Allen, and did not pull out the stumps. There was good pasture in the grove, and it was not necessary to cut trees for pasture.

V. An injunction will issue restraining a party from cutting timber standing and growing for ornament, even if two miles distant from the house. (*Lord Tamworth v. Lord Ferres*, 6 Ves. 419. *Day v. Merry*, 16 id. 375. *Burges v. Lamb*, Id. 182. *Coffin v. Coffin*, Jacob, 70. *Bacon Abrid. tit. Waste*, N. 1 *Greenleaf's Cruise*, 141.) 1. The principle on which the court has gone is that if the testator has gratified his own taste in regard to the situation of ornamental trees, his wishes are to control, even if most disgusting to the tenant for life. (*Bacon Abrid. tit. Waste*, N. 1 *Greenleaf's Cruise*, 141. *Dounshire v. Lady Sandys*, 6 Ves. 107.) In this case the testator had set apart and preserved this grove as an ornament to the place for thirty or forty years, and never allowed any of it to be cut.

VI. The English rule should be applied in this case. It is only changed where the land is new and uncultivated. (*Jackson v. Brownson*, 7 John. 236.)

VII. What the plaintiffs have had the good luck to sell the grove for has nothing to do with this case. There is no evidence as to what the grove was worth per acre. It was proved that the land, without the timber was worth \$150 per acre. And all the witnesses agree that cutting the timber was an injury to the farm.

*By the Court, E. DARWIN SMITH, P. J.* Waste, as Blackstone defines it, is "a spoil or destruction in houses, gardens, trees, or other corporeal hereditaments to the disherison of him that hath the remainder or reversion in fee simple or in tail." (2 *Black. Com.* 382.)

The doctrine of waste of the common law is not in its strictness applicable to the condition of things in this country. What in England might be injurious to the inheritance and therefore waste, would probably, in most parts of this country, be the very reverse of injury to, would be actual improvement of, the estate. But the law remains with us as in England, that such cutting of trees or timber as will work a permanent injury to the freehold or inheritance, in the absence of any specific leave or license to cut such trees or timber, is *waste* for which an action will lie, in equity, for the prevention of such injury by injunction, before it is committed, or at law, for the recovery of damages, by the remainder-man, after the injury is done. Such is this action.

Whether the cutting of trees and timber in any case is such an injury to the inheritance, or not, is necessarily a question of fact, and depends upon the particular circumstances of every case. This question belongs to the jury, unless it is tried by the court, as in this case, by the consent of the parties, when the judge is substituted in the place of the jury. (*Jackson v. Brownson*, 7 *John.* 226. *Doe v. Wilson*, 11 *East*, 56. *Hinchman v. Irvin*, 3 *Dana*, *Ken.* 123.)

The learned judge who tried this action at the circuit, finds as matter of fact that the defendant, while in possession of the premises in question, wrongfully cut and destroyed and converted to his own use all the timber on the north part of said grove, standing adjoining and south of Main street, in said village of Bath, covering about two acres, disfiguring the premises in question, and materially injuring the inheritance. And he further finds, as a con-

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clusion of law, that the defendant, in cutting and destroying the timber aforesaid, committed waste on the premises in question, of which the plaintiff was seised of an estate of inheritance. The finding in fact is in substance and effect a finding that the cutting of the timber in question was *waste*.

This finding not being unwarranted by the evidence; it seems to me conclusive, and cannot be disturbed.

The judgment must, therefore, be affirmed.

[MONROE GENERAL TERM, June 1, 1868. *E. D. Smith, Johnson, and J. C. Smith*, Justices.]

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CYNTHIA R. LEET vs. WILLIAM G. McMASTER.

The plaintiff, being the assignee of a mortgage made by P. employed S. an attorney, to foreclose the same by advertisement, who caused a notice of the sale to be published, appointing the 8th day of September, 1866, for the day of sale. The defendant, desiring to bid upon the property, but having doubts about the legality of the proceedings, requested S. to adjourn the sale one week. S. consented to this, provided the defendant would give him \$100 for a claim he had against the mortgagor's wife, to which the defendant assented, and the sale was adjourned. S. becoming satisfied his proceedings were not legal, commenced new proceedings, and appointed December 10, 1866, as the day of sale; on which day the plaintiff directed S. to adjourn the sale two weeks, and countermanded instructions previously given to a third person to attend the sale, and bid off the premises. S. disregarded the direction given him, and sold the property, on the day appointed, to the defendant, he being the highest bidder, for \$2100, subject to a prior incumbrance of \$671; the property being worth \$4000. The defendant had no knowledge, at the time of the sale, of any instructions to S. to adjourn the same. There was no agreement between S. and the defendant to share any profits arising from a resale, and the \$100 had never been paid by the latter to the former. S. was irresponsible.

*Held*, 1. That if there was any fraud in the matter, for which the defendant was liable, it was in procuring S. not to sell the premises on the day originally appointed; and that the agreement for the payment of the \$100, made in September, and the neglect to sell then, had no connection with, or relation to, the sale made in December, upon a new notice.



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2. That assuming that there was no fraud in the case, on the part of the defendant, he having paid for the property more than two thirds of its value, as found by the referee, and nearly the full value, as estimated by some of the witnesses, the hardship was not so severe on the plaintiff, that the court would grant relief, allowing the sale to stand as security for the money paid by the defendant.
  3. That the case was not within the principle laid down in *Boyd v. Dunlop*, (1 John. Ch. 478,) that where a deed is sought to be set aside as voluntary and fraudulent against creditors, and there is not sufficient evidence of fraud to induce the court to avoid it absolutely, but suspicious circumstances as to the adequacy of the consideration, and fairness of the transaction, the court will not set aside the conveyance altogether, but permit it to stand as security for the sum actually paid.
  4. That S. being authorized to make the sale, employed for that purpose, and acting within the scope of his authority, and the defendant purchasing the premises without knowledge of any private instructions to such agent, his rights were not affected by the fact that such agent made the sale contrary to, and in disregard of, the instructions of his principal.
  5. That it was not a case coming within the authorities relating to client and attorney, in which the court will, at the instance of the client, relieve him from some improper act of the attorney; it not being a case in court, or a judicial proceeding, but a sale under the power in the mortgage, by S. the agent, or attorney in fact, employed to make the same.
  6. That had S. refused to pay over the money received on the sale of the premises, the court would have entertained summary proceedings against him, to enforce the payment of the money; the employment to foreclose a mortgage by advertisement, being regarded as so connected with his professional character as to afford the presumption that such character formed the ground of his employment. But when another person is to be affected, other principles of law, as to him, are to be consulted.
- A notice of sale, on a statutory foreclosure, need not specify that the mortgage will be foreclosed.

**A**PPEAL from a judgment entered upon the decision of a referee. The plaintiff was the assignee of a mortgage made by one Hiram Pomroy, and she, by her agent, Daniel Pomroy, employed George Sprague, who was an attorney of this court, to foreclose the mortgage by advertisement, pursuant to the statute. Sprague caused a notice of the sale to be published, appointing the 8th day of September, 1866, for the day of sale. At the time and place appointed, Sprague attended, and the defendant

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McMaster, desiring to purchase the premises, also attended. McMaster had doubts about the legality of the proceedings, and requested Sprague to adjourn the sale one week, to enable him to ascertain whether the proceedings were legal. Sprague owned a claim of several hundred dollars against the wife of Hiram Pomroy, and he proposed, if McMaster would agree to pay him \$100 for the claim, he would adjourn the sale, and it was so agreed between them, and Sprague adjourned the sale to a future day. In the mean time Sprague became satisfied that his proceedings were not legal, and he thereupon commenced new proceedings, and appointed December 10, 1866, as the day of sale. Hiram Pomroy, the mortgagor, desired that the sale should be postponed for two weeks. On the morning of the day designated for the sale, Daniel Pomroy, acting for the plaintiff, directed Sprague to adjourn the sale two weeks. Previous to this, he had instructed his son to attend the sale and bid off the premises. He countermanded this instruction when he directed Sprague to adjourn the sale. Sprague attended at the time and place designated in the notice and offered the premises for sale, and the defendant McMaster, being the highest bidder, became the purchaser, at the bid of \$2100, subject to incumbrances—a prior mortgage for \$400 with unpaid interest and some costs—of \$571. The referee found that the premises were worth \$4000. There was no person present at the sale authorized to bid for the plaintiff, or to act for her, except Sprague, and he had no authority other than such as arose out of his general employment to foreclose the mortgage. The defendant McMaster had no knowledge, at the time of the sale, of any instructions to Sprague to adjourn the sale. The referee found that McMaster had paid to Sprague the amount of his bid; that he had not paid the \$100 agreed to be paid, &c. as above stated. He also found that there was no agreement between Sprague and McMaster to share the profits which

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McMaster should make on a sale of the premises. Also that Sprague had no pecuniary responsibility; and that there was no bond with the mortgage. He also found that Sprague, after opening the sale, was reminded of his instructions to adjourn, and was requested so to do, but that he declined to do so unless he was secured the \$100 above mentioned, expressing the apprehension that if he then adjourned, McMaster would not pay him the \$100. The referee, however, found that McMaster had no knowledge of these facts. A question was raised upon the regularity of the sale, which is sufficiently noticed in the opinion. The referee came to certain conclusions of law, which are fully stated, and dismissed the complaint with costs.

*Holmes & Fitts*, for the plaintiff.

*L. F. & G. W. Bowen*, for the defendant.

*By the Court*, MARVIN, J. The plaintiff, in his complaint, alleges confederation between Sprague and the defendant, to defraud her, by making the sale at the time and under the circumstances it was made. These allegations are denied, and the testimony failed to establish them, and the referee has, in effect, found against them.

There cannot, of course, be two opinions touching the conduct of Sprague, and it is to be regretted, on the plaintiff's account, that he is irresponsible. But what is the position, and what are the rights, of the defendant? The referee was requested to find as a fact that the defendant was not a purchaser in good faith. By which I understand that it is claimed that the defendant was a party to the fraud of Sprague. The agreement of Sprague and the defendant that the latter should pay the former \$100 for his claim against the wife of Hiram Pomroy, in consideration that Sprague would adjourn the sale a week, is referred to as evidence of a fraudulent understanding be-

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tween the parties. This agreement was in September. The adjournment was had, and the proceedings were finally abandoned. This agreement had no relation to the sale in December, upon the notice. I do not feel called upon to remark upon this agreement, so far as the defendant is concerned. He attended at the time and place designated for the sale, for the purpose of bidding, but having doubts whether, if he purchased the premises, he would get a good title, he requested an adjournment for a week, to give time to investigate, and thereupon the agent having charge of the proceedings consents, provided the applicant for the adjournment will give him \$100 for a certain claim he has, and the applicant submits. In the meantime the agent becomes satisfied that his proceedings are invalid, and abandons them. If there was any fraud in this matter for which McMaster was liable, it was in procuring the agent not to sell the premises on that day, and the neglect to sell then has no connection with the sale that was made in December.

But it is insisted that if there was no fraud, in the case, on the part of the defendant, the hardship is so severe, on the plaintiff, that the court will grant relief, allowing the sale to stand as security for the money paid by the defendant. The hardship consists in the sale of premises worth \$4000 for \$2671, a loss, it is said, of over \$1300. Some cases are cited. In *Boyd v. Dunlap*, (1 John. Ch. 478,) the bill was by creditors, to set aside transactions between the debtor and his son, on the ground of fraud. The chancellor held that were there was not sufficient evidence of fraud to induce the court to avoid the deed absolutely, but as there were suspicious circumstances as to the adequacy of the consideration and fairness of the transaction, the court would not set aside the conveyance altogether, but permit it to stand as security for the sum actually paid. The son had taken a conveyance from his father greatly below the real value of the land, the father

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still continuing in possession; and though the court, from the evidence, could not say that this was done with intent to defraud creditors, it held that it was inequitable that the son should hold the property, as against the creditors of his father; and that all he could justly claim was the amount he had paid for the land. This case is not in point in the present case.

*Dunn v. Chambers*, (4 Barb. 376,) is also cited. In that case the court applied the principle in *Boyd v. Dunlap* to a case where a party sought relief from a sale made by himself. The court came to the conclusion that there was no actual fraud on the part of the purchaser, but that the case was such as to come within a class of frauds described by Lord Hardwicke in *Chesterfield v. Janssen*, (2 Ves. 155.) to be "such bargains as no man in his senses, and not under a delusion, would make on the one hand and as no honest and fair man would accept, on the other." The plaintiff and defendant were cousins, and held the property, worth \$1800, under the will of their grandfather, and the plaintiff, a sailor, of intemperate habits, sold his interest for \$100, receiving \$70 in money, and a note for \$30. HARRIS, P. J. is careful to say, in the opinion of the court, that "no rule is better settled than that mere inadequacy of consideration does not form a distinct ground of equitable relief. And yet there are cases where there is no positive evidence of fraud, in which the inequality of the bargain is so gross that the mind cannot resist the inference that though there be no direct evidence of fraud, such a bargain must have been in some way improperly obtained." The present case is not within the rule referred to. Here the defendant paid for the property more than two thirds of its value as found by the referee, and nearly the full value as estimated by some of the witnesses. Suppose the plaintiff himself had sold the property for the sum paid by the defendant; would any one

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suppose that she could obtain relief in a court of equity against such sale?

But the agent sold the property against instructions; and it is claimed that the act of the agent was without authority, and that the defendant therefore took nothing by his purchase. Waiving the question as to the remedy in case the act of the agent was wholly unauthorized, it is enough to say that the facts do not raise the question. The agent was authorized to make the sale; he was employed for that purpose; he had advertised the premises for sale under the power contained in the mortgage; the defendant attended the sale for the purpose of purchasing the premises; he had no knowledge of any private or secret instructions given to the agent, and his rights were not affected by such instructions. The agent was acting within the scope of his authority. (*Story on Agency*, §§ 330, 333. *North River Bank v. Aymar*, 3 Hill, 262.)

Nor is this a case coming within the authorities relating to client and attorney, in which the court will, at the instance of the client, relieve him from some improper act of the attorney. It was not a case in court, or a judicial proceeding. (12 Wend. 60.) The sale of the premises was under the power in the mortgage, and Sprague was the agent, or attorney in fact, to make the sale.

When the proceedings are in court, and the attorney does an unauthorized act for a party prejudicial to him, the party may have relief against such act, if the attorney is irresponsible. The relief is given in the action, and care is taken to preserve the rights of the other innocent party, and as to third persons. (*See Denton v. Noyes*, 6 John. 296; *Am. Ins. Co. v. Oakley*, 9 Paige, 494; *Grah. Pr.* 52, *et seq.*) So, if the employment of an attorney is so connected with his professional character as to afford a presumption that his character as attorney formed the ground of his employment by the client, the court exercises a summary jurisdiction over him; as where he is

employed to collect money, &c. and has collected it, the court will entertain proceedings, on motion, to enforce the payment of the money to his client, &c. (*Matter of Executors of Aitkin*, 4 Barn. & Ald. 47. *Ex parte Staats*, 4 Cowen, 76.) But there are cases between the attorney and client, when the attorney fails to perform to his client his duty as attorney. The principle upon which they rest, has no application to the present case. Even in a case where the attorney is employed in a matter wholly unconnected with his professional character, the court will interfere, in a summary way, to compel him to execute faithfully the trust reposed in him. (*See above cases.*)

In this case, had Sprague refused to pay over the money received on the sale of the premises, in my opinion the court would have entertained summary proceedings against him to enforce the payment of the money. The employment to foreclose a mortgage, by advertisement, would be regarded as so connected with his professional character as to afford the presumption that such character formed the ground of his employment. But where another person is to be affected, other principles of law, as to him, are to be consulted.

There is no validity in the objection that the notice of sale was insufficient. The objection is, that the notice "does not specify that the mortgage will be foreclosed." The notice is, that default has been made in the payment, &c. describing the mortgage, and the record of it; and that there is due a sum mentioned; the premises are then described; and then that, by virtue of a power of sale in said mortgage contained, the above described mortgaged premises will be sold at public auction, to the highest bidder, &c. &c. It will be seen, on consulting the statute, (2 R. S. 544, § 4,) that the notice contains all that is required.

The judgment must be affirmed, with costs.

[ERIE GENERAL TERM, February 17, 1868. *Daniels, Marvin and Davis*, Justices.]

## DUNN vs. WRIGHT.

51b	244
65 AD	478

An agent employed to sell goods on commission, is a mere broker. As such he is authorized to make contracts for the sale and delivery of the goods, but is not authorized to make such contracts in his own name; nor to receive payment for the property so sold.

Where goods thus sold by a broker are not entrusted to the possession of the latter, but are sent by the seller to the purchaser directly, with a bill or invoice thereof, and the purchaser receives the goods, with notice that the broker does not own them, and has no right to receive payment for them, he cannot set off a debt due to him from the broker, against the claim of the seller for the price.

THIS action was commenced before a justice of the peace of Ontario county. The complaint was for goods sold to the defendant. The answer denies the complaint, alleges payment, and that the goods referred to in the complaint were sold to the defendant by and in behalf of one Stannard.

The return of the justice shows that, in January, 1866, the plaintiff was a manufacturer of paper bags, residing in the city of New York. The defendant was a miller, at Richmond Mills, Ontario county. In December, 1865, or January, 1866, one Andrew J. Stannard, who resided in Canandaigua, N. Y. applied to the plaintiff, in New York, and asked permission to take a set of samples of paper bags, to sell the same on commission. The plaintiff told Stannard how much commission he would pay, but gave him no authority or permission to receive pay for the bags, or to collect any account. Before the time in question, the defendant and Stannard had had dealings together, and the defendant had sold him flour, and the defendant had bought sugar, &c. of Stannard, who, in fact, owed the defendant. In January, 1866, the defendant met Stannard in Canandaigua, and Stannard offered to sell him some paper bags, and said he would like to let the defendant have some in payment. The defendant finally ordered two hundred one-quarter barrel sacks, and two hundred



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one-eighth barrel sacks. The bags were to be sent to the defendant by express, and the defendant was to call and get them. No questions were asked by the defendant as to whether the bags were the property of Stannard or not. The defendant testified he did not know where they came from until he saw "Dunn's" name on the bags. The defendant received the bags before he gave Stannard credit for the amount. The defendant received the bags in question, and got them at the American Express Company's office, in Canandaigua. The bags were printed or stamped on the outside, part "Best Buckwheat Flour, from Richmond Mills," and part "Best Family Flour, from Richmond Mills," and the plaintiff's name was printed or stamped on the bags. The goods were sent by the plaintiff directly to the defendant, addressed to him at Canandaigua. At the time of the shipment a bill of the same was sent to the defendant, by mail, at Canandaigua. The plaintiff also drew a draft on the defendant for the amount of the bill. At the time the defendant received the bags from the express company, Stannard owed the defendant from \$50 to \$75. The only proof of payment was, that the defendant gave Stannard credit on the prior indebtedness existing between them. The defendant credited Stannard 13th February, 1866. At the time the defendant gave Stannard an order for the bags, nothing was mentioned as to the manner of payment. The plaintiff employed Stannard to sell the bags on commission. This transaction with the defendant was the only sale Stannard ever negotiated for the plaintiff. The plaintiff never saw him afterwards. The defendant received these bags, and had used them. The plaintiff has never received pay for his property, either from the defendant or Stannard.

On the 21st of January, 1867, the justice rendered judgment in favor of the plaintiff for \$25 damages, and \$5 costs. The defendant appealed to the county court of

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Ontario county, which court reversed the judgment of the justice. The plaintiff appealed from the judgment of the county court to this court

*Metcalf & Field*, for the appellant. I. The evidence shows that Stannard was simply the agent of the plaintiff, with power to sell his goods on commission. He had no other authority or instructions. Stannard was, therefore, an agent with special powers. And all persons dealing with agents, with special powers, must ascertain the extent of their authority to represent their principal. (*North River Bank v. Aymar*, 3 *Hill*, 266. *F. and M. Bank v B. and Drovers' Bank*, 16 *N. Y. Rep.* 134.) The plaintiff used diligence in this matter. He has committed no act by which the defendant has been misled or prejudiced. He did not entrust his agent with the goods. He retained the property within his own control until sold. He shipped the goods to the defendant directly. Stannard never had any control of the property. The plaintiff stamped his name on the bags, and the defendant admits that when he took the goods from the express office, he saw the stamp, and then knew where the bags came from. With this knowledge before him he accepted the bags, gave Stannard credit for the amount, and used the bags. The defendant was bound to inquire of Stannard whether the goods were his, or belonged to some one else. It is evident that the defendant, in his anxiety to get the amount of his old claim against Stannard, omitted to do that which the law says a prudent man should do. The moment his eye fell upon "Dunn's" name, stamped on these bags, he had notice that there was, to say the least, something about the transaction which Stannard had not disclosed. Giving credit to Stannard on the prior existing indebtedness, was a voluntary act of the defendant. Stannard did not ask him to pay, in any way. Stannard

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was not present when the goods were received, nor when the credit was given.

II. Stannard was simply employed to sell the goods on commission. When the sale was complete, his duties were ended. He was entitled to receive his commission. Stannard had no authority from the plaintiff to collect this account of the defendant, nor any authority to collect pay for the goods so sold by him to the defendant. Stannard simply represented the principal in the sale of the goods. He was not a *factor*. The courts have always held that factors are entitled to, and enjoy, greater powers and privileges, for the reason that, in their case, the owners of the property have given to their factors the goods themselves to be delivered by them, and have thereby given all the *indicia* of authority, and payment to them has been held good. In this case, the plaintiff did not entrust Stannard with his property. No samples, even, were shown at the time the defendant agreed to buy the bags.

III. It was not pretended or claimed, before the justice, that Stannard had any real authority from the plaintiff to collect pay for the goods in question. The claim was that, in fact, Stannard made the sale as though he was the owner of the paper bags, and giving Stannard credit on a prior indebtedness existing between them, (the defendant and Stannard,) was good payment. 1. In answer to that proposition we say, that Stannard could not, in that way, affect or change the ownership of this property. The agent had no right to sell in his own name. (*See Baring v. Corrie*, 2 B. & Ald. 138; 4 Eng. Com. Law Rep. 436; *Higgins v. Moore*, 34 N. Y. Rep. 424.) 2. The defendant had no right to rely on Stannard's statement, as against the plaintiff. He was bound to make such inquiries, in relation thereto, as would satisfy a prudent man as to the real character of Stannard, as to whether he was selling his own goods or those of some one else. 3. Besides, the

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evidence discloses the fact that Wright had, before this time, had dealings with Stannard, as the agent of Foot & Lindsley, a grocery house in New York; and knowing that Stannard was only selling one kind of goods on commission, the defendant might reasonably have inferred that he only sold these paper bags in the same manner, and not as the owner. 4. Again, the justice having decided, as matter of fact, on a conflict of evidence, that the plaintiff sold and delivered the bags to the defendant, the county court had no right to reverse the judgment on that question, even if erroneously decided.

IV. Stannard had no authority except to sell the goods. An authority or instruction to sell goods, gives the agent no right or authority to collect the accounts for goods so sold, or to demand and receive payment for the same. He cannot exceed his instructions. When the goods are sold, his duties are ended. (*Vide Story on Agency*, §§ 429, 430. 3 *E. D. Smith*, 71.) Nor can he bind his principal to other modes of payment than a payment of money at the time of sale, or on the usual credit. (*See Kent's Com. vol. 2, p. 623.*) The case of *Higgins v. Moore*, 34 *N. Y. Rep.* 417,) is a case very similar to this, and, we submit, is decisive of the case in favor of the plaintiff; also *Easton v. Clark*, (35 *N. Y. Rep.* 225.)

V. The evidence shows, that the only payment made by the defendant to the plaintiff was by giving Stannard credit on a debt which Stannard, before the date of purchase of the bags, owed to the defendant. The defendant paid no money, and gave no new obligations. He parted with nothing in giving Stannard credit. This is not a legal payment, and the principal is not bound by it. (*See cases above cited; and also Easton v. Clark*, 35 *N. Y. Rep.* 235.) It was not a payment, in the usual course of business. The remarks of Abbott, J. in the case cited, (2 *Barn. & Ald.* 137,) aptly apply to this case: "If the defendant were to succeed in this case, the effect would be

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that the goods of one man would be applied in discharge of the debts of another." It would be a very easy way to pay Stannard's debts. (See 3 *E. D. Smith*. 71; *Guy v. Oakley*, 13 *John*. 331; *Bliss v. Bliss*, 7 *Bosw*. 339; *Higgins v. Moore*, 34 *N. Y. Rep*. 417; *Easton v. Clark*, 35 *id*. 225.)

VI. Unless the plaintiff can recover of the defendant, he will be without remedy. The defendant has had the benefit of the plaintiff's property, and has not paid him. The plaintiff has no claim against Stannard. Stannard never received the goods, nor has he ever received the plaintiff's money; nor has he misappropriated the plaintiff's money, because he has never had any to misapply. Stannard never, so far as the case shows, has applied to the plaintiff to pay him his commission for selling these bags. The defendant's claim against Stannard has not been affected or changed by this transaction.

*D. Herron*, for the respondent. The question is, is the respondent liable to the appellant for the bags?

I. The respondent had a right to infer that Stannard had a right to sell the bags in his own right. (*Johnson v. Jones*, 4 *Barb*. 369.)

II. The respondent bought, in ignorance of the appellant's rights, which he would not have done if he had known he was to pay the plaintiff. It was the plaintiff's fault not to give him notice of his rights, and he cannot, therefore, recover. (See 32 *Barb*. 9; 35 *id*. 157, 463.)

III. As Stannard was authorized to sell on commission, he had a right to receive pay. (*Story on Agency*, §§ 102, 106. 6 *Cowen*, 354. 21 *Wend*. 279.)

IV. Showing that Stannard was employed in selling goods for a grocer, does not show notice to the respondent that he was acting as agent for the appellant in selling bags. (See 24 *Wend*. 458, 462-3; 3 *Hill*, 72; *Story on Agency*, §§ 390, 404, 419, 420, 444.)

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V. The appellant, by suing for the price, affirmed the sale by Stannard. (24 *Wend.* 460. *Story on Agency*, § 389. 4 *Barb.* 36, 42.)

*By the Court*, E. DARWIN SMITH, P. J. Upon the facts clearly proved, on the trial, Stannard, who made the contract for the sale of the bags in question in the suit, was a mere *broker*. As such he was authorized to make contracts for the sale and delivery of the plaintiff's bags, but he was not authorized to make such contracts in his own name; nor was he authorized to receive payment for the bags so sold. (*Higgins v. Moore*, 34 *N. Y. Rep.* 431. *Baring v. Corrie*, 2 *Barn. & Ald.* 138.)

When the defendant made this contract to purchase these bags, he clearly knew nothing of the plaintiff, and doubtless supposed he was purchasing them of Stannard, and expected thereby to get payment of his debt from him. But he knew that Stannard was not a dealer in such bags, but was simply engaged as a clerk in the grocery business for a firm trading in Canandaigua.

The goods were received by the defendant at Canandaigua, to which place they were sent by the plaintiff by express, accompanied by a bill or invoice of the bags, sent to the same address by mail. When the defendant received the goods he knew that they came from the plaintiff, as they were marked with his name. He had not then paid for the goods, nor did he afterwards ever pay for them, in fact. He simply credited the amount of the cost of the bags, in his books, to Stannard.

When he thus received the goods he had notice that Stannard did not own them, and had no right to receive payment for them. The plaintiff did nothing to mislead him. He had not trusted Stannard with the possession of the property or with any evidences of title thereto. The goods came by express directly to the defendant. Stannard had no control over them, and never had any

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thing to do with them, except to send to the plaintiff the defendant's order for the number and description of the bags. The case, in its facts and in the principle involved, is, it seems to me, clearly within the case of *Baring v. Corrie*, (*supra*.) In that case, Coles, the broker, sold the sugars and ordered them, as Stannard did the bags, in this case, in his own name, and they were delivered to Corrie. The defendant in that case claimed that he purchased the goods of the broker, as the defendant does here that he purchased the bags of Stannard, and that he had a set-off or demand against the broker; but the court held that the plaintiff was entitled to recover the price of the sugars. Judge Bayley said: "The plaintiffs did not trust the broker with the muniments of their title, or the possession of the goods." And the case was decided chiefly upon that ground. The case of *Hogan & Miln v. Shorb*, (24 Wend. 458,) is not in conflict with the case of *Baring v. Corrie*. It was put upon the distinction between a broker and a factor. Morris, who sold the goods in that case, was a factor. He was entrusted with the goods, delivered them at the time of the sale, and made the sale in his own name, and was himself a merchant and trader. He had a right to sell the goods in his own name and to receive payment; not so with Stannard.

The defendant has received the plaintiff's property, and has not paid him for it, and he clearly had no right to pay Stannard for property he did not own, and he had not the slightest right to receive payment for said property.

It follows that the plaintiff is entitled to recover the price of such property, as the plaintiff did in the case of *Baring v. Corrie*, (*supra*.) and the judgment rendered by the justice therefore was right, and the judgment of the county court reversing the same was erroneous, and should be reversed, and that of the justice affirmed.

## WOODRUFF vs. PETERSON.

On a sale of a quantity of wood, the purchaser, after he had drawn away two loads, and while in the act of drawing away a third, discovered that the quality of a portion of it was different from what the contract called for; *Held* that he could not rescind the contract of sale, except by restoring, or offering to restore, what he had received under it.

On an executory contract of sale, the vendee, if he keeps the article, may, it *seems*, recoup his damages, in case of fraud, but not for breach of contract. The case of *Reed v. Randall*, (29 N. Y. Rep. 358,) criticised. *Per* MORGAN, J.

**A** PPEAL from a judgment rendered upon the report of a referee.

The complaint alleged that the plaintiff, in July, 1866, sold and delivered to the defendant, upon his premises, eighteen and one half cords of wood, at \$3.50 per cord, which the defendant refused to pay for. The answer denies the allegations of the complaint. On the trial before the referee, the defendant objected to parol evidence of the contract, it not appearing that any of the wood had been delivered or paid for. The objection was overruled, and the defendant excepted. The plaintiff then gave testimony tending to prove, and the referee finds, that the defendant was a brick maker in Watertown, and the plaintiff a farmer residing within two and a half miles distant; that in July, 1866, the defendant applied to the plaintiff to purchase wood, and went with the defendant to examine it; that the wood had been cut and piled, but the piles had become so scattered that an accurate measurement could not be made, while some part consisted of large chunks which could not be burned in the defendant's arches; and some portions of it were scattered around on the ground, was wet and would not be dry enough for the defendant's use, as he wanted it for immediate use; that the plaintiff pointed out to the defendant several piles on the hill, and represented to the defendant that they were like the piles they had examined, except that there was no soft wood in them; and that thereupon the defendant



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agreed with said plaintiff to purchase of him all of said wood except what lay scattered upon the ground, which was not dry enough for immediate use, and except the chunks too large to be burned in his arches, and to pay therefor at the rate of \$3.50 per cord, and the plaintiff agreed to sell it to the defendant at that price, and to draw out the same and pile it in a certain lane where it could be measured.

It is further found by the referee that the plaintiff, within a few days, drew out and piled the wood in the lane, except a portion of the large chunks, but that the wood so drawn out and piled up contained a quantity of chunks too large for the defendant's use, as well as the wet wood laying upon the ground, which was unsound, wet and partly rotten, and unfit for the defendant's use; that after the wood was so drawn out the defendant sent his hired man to measure the wood and draw away a load of it; that the hired man of the defendant on the same day drew one load, and the next day drew another. The piles, on being measured, were reported to the defendant at eighteen and a half cords. His attention was then, for the first time, called to the quality of the wood, and he objected to the quality of a portion of it. The first load was good wood, and when the second load was drawn, the hired man informed the defendant that he had thrown out some as unfit for use. The next day the defendant accompanied the hired man, and on seeing the plaintiff, objected to the quality of the wood, complaining that it was not such quality of wood as he had purchased; and while the plaintiff and defendant were talking together on the subject, the hired man loaded up and drove away with another load. Immediately after, the defendant refused to accept the wood under the contract, or to pay for any he had already taken away. It also appeared that the defendant did not restore, or offer to restore, to the plaintiff the wood which he had taken.

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The referee held as matter of law that the title to the wood did not pass under the first agreement, for the reason that it was not separated and identified; and that when it was thus separated and ready for delivery, the defendant had the right of accepting or rejecting the same; that the plaintiff committed no fraud by drawing out and piling up wood unfit for the defendant's use; that the plaintiff had a right to require the defendant to accept of the whole or not any, and that the defendant had no right to accept a part and reject a part; that the defendant having sent his hired man and taken three loads before exercising the right of rejection, he waived such right, and must be deemed to have accepted the whole quantity delivered, unless he restored or offered to restore what he had taken away. The defendant's counsel excepted to these various propositions of law.

*James F. Starbuck*, for the appellant.

*Anson B. Moore*, for the respondent.

*By the Court*, MORGAN, J. It is very evident that the defendant was not bound to accept the wood, as it was not of such a quality as the contract called for. It is also apparent that in such a case the defendant is entitled to a reasonable time to exercise his choice. And I think the defendant was in time, when he went to the plaintiff's premises the next day and made the examination necessary to qualify him to make his election with discretion and judgment.

The only point of difficulty is, that the plaintiff had already drawn away three loads of the wood, and made no offer to return it. One load might have been burned up before the defendant was aware of the quality of the remainder; but when the last load was taken there was no

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difficulty in offering to restore that, and to pay for what had already been used.

And it may be a question whether the title to the wood did not pass when it was measured to the defendant, and no objections made by the defendant, and no objections made by the defendant's hired man, who was the defendant's agent, for the purpose of measuring the wood, and who accepted one load from the pile after it was measured. But waiving the discussion of this question, and allowing the defendant until the next day to examine and accept the wood, I think the referee was right in holding that the receipt of three loads by the defendant without returning or offering to return it, was in law an acceptance of the whole quantity.

The question of fraud does not arise upon the pleadings, but the whole case turns upon the receipt of a part of the wood by the defendant, without offering to restore it to the plaintiff. When a vendee desires to rescind the contract of sale, he must restore or offer to restore to the vendor whatever he has received under it, and a retention of the property by the purchaser, in the absence of fraud, is deemed in law an admission on his part that the contract has been performed. (*Reed v. Randall*, (29 N. Y. Rep. 358.) If the vendee desires to rescind, he must rescind *in toto*. It must be done in a reasonable time and wholly. (*Chitty on Contracts*, 635, 636.)

The case might be different if the quality of the article could only be known after the trial, and the part received had been used for that purpose, so that it could not be returned; or if the article had no value. (*Chitty on Contracts*, 398.)

It is clear that the doctrine of *Reed v. Randall*, is not at variance with the law as it has always been understood, so far as it requires a return of the property in order to rescind the contract of purchase. This was always the law of contracts. So far as that case denies to the purchaser

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the right to damages, because the article delivered under the contract of sale is not what the contract required it to be, it may be considered as not wholly in accordance with the opinion of some of the judges in other and analogous cases. The vendee, it seems to me, ought to have his election, either to return the article because it is not what the contract called for, and thus rescind the sale, or to retain it and recover his damages for a breach of the contract of sale. It is quite obvious, to my mind, that the retention of the article sold should not, in all cases, be deemed a waiver of the conditions of sale. But while the rule declared in *Reed v. Randall* is regarded as authority by the court in which it was laid down, it is the duty of the Supreme Court to adhere to it. Without reference to that rule, the defendant is liable in this action for the purchase price of the wood in question. If he had sought to recoup his damages because the wood was not what the contract called for, then the doctrine of *Reed v. Randall* would have been in point to defeat such a defense. If he had set up the fraud of the plaintiff in mixing in rotten and wet wood, I think the evidence would have tended to establish it, and the damages might have been recouped, according to all the authorities.

The result is, that the defendant is required to pay the whole contract price for the wood, without reduction on account of its quality, he having received a portion of it, and not having offered to return that portion when he desired to rescind the sale.

The judgment should be affirmed.

Judgment affirmed.

[ONONDAGA GENERAL TERM, June 30, 1868. *Iuster, Mullin and Morgan*, Justices.]

JOHN J. LOOMIS, administrator, and ANNA LOOMIS, administratrix, &c. *vs.* ADAM LOOMIS.

Exceptions to the report of a referee should not be general. They should be specific, and point out the error complained of.

The provision of the Revised Statutes declaring that "a will executed by an unmarried woman shall be deemed revoked by her subsequent marriage," is not repealed by implication by the acts of 1848, 1849 and 1860, for the more effectual protection of the property of married women, but is still in force.

THE deceased, Catharine Loomis, was in the year 1853 married to the defendant. Her maiden name was Catharine Coon. Before she was married, in the year 1853, she made a will—leaving \$750 in money, which, after she was married to the defendant, came to his possession. She died in November, 1860, leaving the defendant her surviving husband. Her said will was proved before the surrogate of Oneida county. The plaintiffs were, by said surrogate, appointed administrators of her estate, with said will annexed. They demanded the money of the defendant, and he refused to pay it, and this action is brought to recover it. The case was tried before a referee, who held the said will to be valid, and that the defendants' right to said money was thereby cut off. Judgment was entered in favor of the plaintiffs, and the defendant appealed to this court.

*N. Messenger*, for the appellant.

*J. Snow*, for the respondents.

*By the Court*, MURRAY, J. There is no available exception to the report of the referee. The exceptions are general, not specific. They should be specific, and point out the error complained of. (*Tyler v. Willis*, 33 Barb. 328. *Ingersoll v. Bostwick*, 22 N. Y. Rep. 425. *Jones v. Osgood*, 2 Seld. 233. *Caldwell v. Murphy*, 1 Kern. 416.)

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The question as to the validity of the said will was distinctly made on the motion for a nonsuit, which was denied and an exception taken. The question to be considered is, was the will of the deceased, made while she was unmarried, revoked by her subsequent marriage to the defendant by section 39 of the Revised Statutes, 5th edition, page 145. If that will is valid, the plaintiff is entitled to recover; the judgment is right. If not valid, the action cannot be sustained. If the said section of the statute is still in force, the will is not valid. That section is "a will executed by an unmarried woman shall be deemed revoked by her subsequent marriage." It is insisted, on the part of the plaintiffs, that that section is repealed by implication, by the acts of 1848, page 307, as amended by the act of 1849, page 528, and the acts of 1860, which were in force at the time of her death. The referee so held, and found for the plaintiffs. In the said acts of 1848, 1849 and 1860, nothing is said about repealing said section of the Revised Statutes. To repeal a statute by implication, the first act must be inconsistent with, and repugnant to, the last act. The repugnancy must be irreconcilable. (*Bowen v. Lease*, 5 *Hill*, 225, 226. *Williams v. Potter*, 2 *Barb.* 316. *McCartee v. Orphan Asylum*, 9 *Cowen*, 506. *Van Rensselaer v. Snyder*, 9 *Barb.* 303.) There is no such inconsistency. There is no difficulty in carrying all the acts fully into effect. A case cannot be imagined where they can ever come in conflict. The first act, on the marriage of a woman, revokes a will made by her before marriage. The last three acts give a married woman a right to receive and hold separate property and carry on separate business, and have her earnings, and to sell, convey, devise and will her separate property—entirely separate and distinct things having no connection with or relation to each other.

It is insisted that the reason for the statute is removed by these last acts, and therefore it should be deemed

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repealed. Be that as it may, the legislature passed these last three acts, without a word to indicate that they intended to repeal the first act, knowing of its existence. It is fair to infer that they had a reason for letting it stand. Indeed, it is in accordance with the spirit of those last acts, which tend to place the wife on the same footing with the husband, as to property. There existed nearly a similar statute as to the husband, when he married and had issue. (3 *R. S.* 5th ed. 145, § 38.)

It doubtless was the intention of the legislature to allow that act to remain, so that when a woman, possessed of separate property, married, she would enter upon her new relations of life untrammelled with any thing she had done while a *feme sole*, requiring her if she wished to make a final disposition of her property, to do so in the light of her then situation, governed by her new affections and desires, and surrounded by her new responsibilities.

If I am right in these views, that act is not repealed, and the will in question must be deemed revoked.

As the law was at the death of the deceased, in the absence of a will, the husband took the personal property of the deceased wife absolutely, not by virtue of administration. (*Ransom v. Nichols*, 22 *N. Y. Rep.* 110. *Ryder v. Hulse*, 24 *id.* 372.) It is now changed by chapter 782 of the Laws of 1867.

The judgment should therefore be reversed, and a new trial granted before a new referee, if either of the parties applies therefor; costs to abide the event.

[BROOME GENERAL TERM, July 21, 1868. *Balcom, Boardman, Parker and Murray*, Justices.]

**JULIETTE RIDER vs. CORNELIUS W. LEGG and others.**

No unvarying rule, as to the amount of proof necessary to establish the execution of a will can be laid down which is to control every case, as the circumstances of each case must differ from any other. Hence it becomes the duty of the court to ascertain, from all the facts and circumstances, whether the instrument offered is established with reasonable certainty, and if it is, to receive the same.

Where all the three subscribing witnesses to a will executed since the Revised Statutes took effect are dead, proof of the signatures of two of them, with a perfect attestation clause, and other circumstances tending to favor the probability that the will is genuine, are sufficient, after a great lapse of time, to justify the reception of the will as evidence, without proof of the signatures of one of the subscribing witnesses and the testatrix.

*Peter Cantine*, for the plaintiff.

*E. Whitaker*, for the defendants.

INGALLS, J. This is an action for the partition of a tract of land situated in Ulster county, of which Jane Legg died seised, and all the parties derive title from her. The principal question presented upon this trial is, whether the paper purporting to be the will of Jane Legg offered as evidence by the defendant Cornelius W. Legg, and under which he claims title to one of the pieces of land mentioned in the complaint, should be received. I am of opinion that the evidence establishes the said paper, as the will of said Jane Legg, and justifies its reception as evidence in this action. The execution of the will was attested by three witnesses. The attestation clause is full, and in proper form, and the signatures of two of the subscribing witnesses are established beyond reasonable doubt. The will, which bears date in the year 1833, was discovered about a year since, in the chest where the papers and money of the testatrix were deposited. Her sons remained upon the premises after the decease of the testatrix, and the chest was used for the purpose of depositing money and papers, as it had been before her



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death. I perceive no circumstances which are calculated to throw suspicion over the transaction, or which tend to the conclusion that fraud or evil practice attends the production or assertion of such instrument. The will is obviously in the handwriting of one of the witnesses, whose signature is established, and who seems to have understood what was essential to its due execution. It purports to have been executed subsequent to the Revised Statutes taking effect, and hence only two witnesses were necessary to its proper proof. All the witnesses are dead. The signatures of two are absolutely established. Prior to the Revised Statutes, at least three witnesses were required. (*Brinkerhoff v. Remsen*, 8 Paige, 491.) The defendant fails to prove the signature of one of the subscribing witnesses, and also that of the testatrix. I think, however, that proof of the signatures of two of the witnesses, with a perfect attestation clause, and other circumstances which tend to favor the probability that the will is genuine, and the length of time which has elapsed, are sufficient to justify the reception of the will as evidence in this action. (*Brinkerhoff v. Remsen*, 8 Paige, 489. *Fetherly v. Waggoner*, 11 Wend. 599, 603. *Chaffee v. Baptist M. Con.* 10 Paige, 85, 90. *Nelson v. McGiffort*, 3 Barb. Ch. 158. *Cheaney v. Arnold*, 18 Barb. 435.) In the last mentioned case, Judge Crippen, at page 438, remarks: "If the witnesses were all dead, the proof of their handwriting would be sufficient to establish the due execution of the instrument by the testator."

In *Lawrence v. Norton*, (45 Barb. 448,) Judge Ingraham, at page 450, says: "Nor are the provisions of the statute, (2 R. S. p. 58, §§ 13, 16,) such as to preclude the admission of handwriting and other matters, to establish the will when some of the witnesses are dead, and others do not remember the occurrence." In *Everitt v. Everitt*, (41 Barb. 385,) Judge Brown remarks: "And if the witnesses are men of good character, and there is no doubt as to

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their signatures, or any other suspicious circumstances, *the attestation clause* would be deemed sufficient evidence of a bequest. In short, the law lays down no inflexible rule in such cases, but accepts the best evidence that can be procured, adapted to the nature of human affairs, human infirmities and casualties which tends with reasonable certainty to establish the fact in controversy." (*Dan v. Brown*, 4 Cowen, 483.) In *Willard's Real Estate and Con.* page 491, the learned author remarks; "And when any of the witnesses are dead, or in such a situation that their testimony cannot be obtained, proof of their signature is received as secondary evidence of the facts to which they had attested by subscribing the will as witnesses to the execution thereof." (See also *Orser v. Orser*, 24 N. Y. Rep. 51.) I am of opinion that the will in question has been substantiated, within the principle settled by the cases referred to. And that no substantial ground is established justifying its rejection as evidence. After such a lapse of time, absolute certainty cannot be expected, and while such evidence should be received with caution to prevent imposition, yet that caution is not to be carried to a length which would override the ordinary, and well recognized rules of evidence in regard to the proof of papers, which have survived the parties who executed and witnessed them. No unvarying rule can be laid down which is to control every case, as the circumstances of each case must differ from any other. And hence it becomes the duty of the court to ascertain, from all the facts and circumstances, whether the instrument offered is established with reasonable certainty, and if it is, to receive the same. The paper is therefore received as the will of the said Jane Legg.

[RENSSELAER SPECIAL TERM, July 27, 1868. Ingalls, Justice.]

## NEWELL vs. GREGG.

No one can become a *bona fide* holder of a promissory note, so as to shut out a valid defense by the maker, when such holder takes it after, by its terms, money is past due upon it.

Where a note is for the payment of money at a specified time, with interest payable annually, the payment of interest *annually* is as much a part of the agreement as the promise to pay the principal. It is a portion of the debt, and if, when the note is sold to a third person, by the payee, a year's interest is past due, the note is then dishonored.

When the instrument furnishes evidence that the written promise to pay has been broken, a party taking the same takes it with a warning that the maker may have some defense.

Where the holder of a promissory note which is invalid in his hands, by reason of its having been already paid, wrongfully transfers it, before maturity, to a *bona fide* holder, who enforces payment thereof, an action will lie against such original holder, by the maker, to recover back the amount.

**A** PPEAL from a judgment entered upon the decision of a referee.

The complaint, in substance, is that the plaintiff gave his note for \$200 to one John R. Gregg, payable to him or bearer, two years after date, with annual interest, date of note April 6, 1864; that he paid the note in full to Gregg, prior to January, 1865, before it became due; that Gregg died, and the note came into the hands of the defendant, as executor; and that he, with notice and knowledge of the payment of the note, did unlawfully and fraudulently, and with intent to compel payment of the note by the plaintiff, a second time, sell and transfer it before it became due, to one Lewis B. Grant, a *bona fide* owner, &c.; and that the plaintiff, when the note became due, was compelled to pay, and did pay it to Grant, &c. The answer was a denial.

The referee found as facts: 1st. That the plaintiff paid to Gregg, in October, 1864, \$200 to apply on the note. 2d. That the note came into the hands of the defendant, as executor of Gregg, before the principal of the note, by its terms, became due, and that he sold and transferred it

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to Grant for a valuable consideration. 3d. That the defendant, before selling the note, had notice of the payment to Gregg of the \$200. 4th. That Grant had no notice. That he paid cash \$166.23, in merchandise \$1.75, a previous indebtedness of \$36.72. 5th. That the plaintiff was compelled to pay, and did pay the note to Grant. Conclusion, that the plaintiff was entitled to recover \$168.28, with interest from July 15, 1865, in all amounting to \$190.66.

*O. W. Johnson*, for the plaintiff.

*Warren & Morris*, for the defendant.

*By the Court*, MARVIN, J. The point is made that Grant was not a *bona fide* holder of the note, and that the defendant should have resisted the claim made upon him by Grant. A year's interest was past due upon the note when, in July, 1865, Grant bought the note, and his attention was called to the fact. Was not dishonor attached to this note? The counsel for the plaintiff claims that although Grant may not have been a *bona fide* holder of the note, as to the interest past due, he was as to the principal not yet due; and that the referee has allowed only the amount of the principal. Grant then paid for the note, cash \$166.53, merchandise \$1.75, a previous indebtedness of \$36.72. Is the position of the counsel sound? The agreement was, two years after date, to pay \$200, with interest payable annually. The payment of interest *annually* was as much a part of the agreement as the promise to pay the principal. It was a portion of the debt. The entire debt was evidenced by one written promise to pay, and this promise was broken when Grant purchased the note. Was not such note dishonored? It so seems to me. Suppose the note had been payable in installments, and one or more of the installments had been past due,

could Grant have purchased the note and maintained his rights as a *bona fide* holder, as to the installments not due, against a defense which the maker could have made against the payee? I think not. It seems to me that when the instrument furnishes evidence that the written promise to pay has been broken, the party taking the note takes it with a warning that the maker may have some defense. It is settled that when a note is payable by installments, or if the interest is payable periodically, an action may be brought for any installment, or any interest, as it becomes due. (2 *Pars. on Notes and Bills*, 463. 2 *Mass. R.* 283. *Id.* 568. 3 *id.* 221.)

For the purpose of charging an indorser of a note payable in installments, there should be a demand of each installment as it becomes due, and a notice of non-payment. (See 1 *Pars. on Notes and Bills*, 374.) These authorities show that the note is dishonored, and the indorser, if demand is not made and notice given, will be discharged, as to such installments, but not as to future installments. The maker's liability will not be affected by the neglect to demand payment, &c. of the installment, but his neglect to pay is a dishonoring of his promise, and is a warning to all subsequent takers of the note. He may have neglected to pay because he had a defense, or he may have paid the whole note. In short, it seems to me that no one can become a *bona fide* holder of a note, so as to shut out a valid defense by the maker, when such holder takes it after by its terms, money is past due upon it.

As to the remaining question, understood to be the question mostly considered upon the trial, I have but little difficulty. The question is whether an action can be maintained by the maker of a note transferred to a *bona fide* holder, the note void or not enforceable in the hands of the payee, the maker having been compelled to pay it? No case precisely in point is cited, and I have found none. The counsel refers to *Cowen's Treatise*, vol. 1, p. 376.

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The author says: "If I hold a note or bill of exchange against you, which is void in my hands for want of consideration, illegal consideration or other cause, but I indorse or otherwise transfer it, before due, so that it is collected against you, I am accountable in this action for the damages. But such transfer must have been before the note or bill was due; for otherwise your remedy is by a defense against the first suit upon it." Though the learned author has cited no authority in support of the text, I do not hesitate to adopt it as sound law, upon principles that are constantly recognized and applied. In the hands of the payee or holder, the note or paper is valueless, and so long as it remains in his hands it cannot harm the maker. The latter, knowing these facts and for the purpose of rendering the maker liable, transfers the paper to one who, by the law merchant, can enforce it, and payment is enforced. This is a fraud upon the maker, and a fraudulent use of the law which makes commercial paper collectable by a *bona fide* holder. In principle I think the case of *Decker v. Mathews*, (2 Kern. 313,) is in point. In that case it was decided by the Court of Appeals that the maker of a negotiable note can maintain an action for its conversion, against a person who, before it has any legal inception, wrongfully negotiates it to a *bona fide* holder for value. It was said, in one of the opinions, in substance, that the note in the hands of any one not a *bona fide* holder, was without value; that no action could have been maintained upon it; that the defendant took the note, and by his wrongful act caused it to become valuable in the hands of a *bona fide* holder, and he received as the fruits of his wrongful act the full amount of such value, and made the plaintiff liable therefor; and that therein was the gravamen of the action.

In the present case the note was invalid in the hands of the defendant, in case it had been paid; and the defendant, by wrongfully transferring it to a *bona fide* holder,

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enabled the latter to enforce payment. If this were the only question in the case, I should not hesitate to advise an affirmance of the judgment; but, for the reason before stated, I think the judgment should be reversed, and there should be a new trial.

The other members of the court expressed no opinion as to the finding being against evidence, but concurred upon the other two questions.

New trial granted.

[ERIE GENERAL TERM, May 4, 1868. *Daniels, Marvin and Davis*, Justices.]

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CHARLES BURWELL vs. ORSON L. KNIGHT and others.

When a case is tried, and a claim is submitted to the jury or the court, it cannot in another action be litigated. Though the pleadings may present the claim, yet if no testimony is given in support of it, and it is not submitted to the court or jury, it will not be barred, unless it is a claim which the party is bound to present and litigate in that suit, as, in some cases, a set off, in a justice's court.

Whether the claim was litigated and submitted is a question which may be proved upon the trial of the second action. If the claim is embraced by the pleadings, specifically, the presumption is that it was submitted and passed upon. But the party alleging the contrary may prove that the claim was not litigated, and not submitted, but that the trial and verdict proceeded upon other grounds.

If the record shows that the claim was not tried and submitted, no other proof is necessary.

Where it appeared from the record put in evidence on the trial that, in a former action between the same parties, the plaintiff in the second action pleaded, by way of defense, the same matter set forth as the ground of the second action, (which matter was proper as a defense,) and that the defendant in that action did not appear upon the trial, and judgment was given upon the testimony of the plaintiff alone; *Held*, that the judgment in the former action did not constitute a bar to the second.

**A** PPEAL from a judgment of the Chautauqua county court, reversing a judgment of a justice of the peace. The present defendant sued the present plaintiff, in a

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justice's court, to recover \$45, the unpaid portion of the price of a horse sold by Knight to Burwell. The defendant in that action, among other answers, set up as a defense a breach of warranty of soundness of the horse, made by Knight upon the sale. The trial was adjourned, and on the trial Burwell, the defendant, did not appear. Knight was sworn as a witness in his own behalf, and the cause was submitted to the justice. Some two or three hours after this, the counsel of the defendant appeared and formally withdrew the answer of the defendant, and requested the justice to note it on his docket. A few days thereafter the justice rendered judgment for the plaintiff. The present action is upon the warranty, and the plaintiff had judgment, which the county court, on appeal, reversed. There are some other questions, which are sufficiently stated in the opinion.

*Julius A. Parsons*, for the plaintiff.

*J. G. Ricard*, for the defendant.

*By the Court*, MARVIN, J. Was the judgment in the action of *Knight v. Burwell* a bar to the present action, it appearing from the record put in evidence on that trial that the present plaintiff pleaded, by way of defense, the same matter now used to constitute his present action, and which matter was proper as a defense; and it also appearing from the same record—the justice's docket—that the defendant in that action did not appear upon the trial, and judgment was given upon the testimony of the plaintiff alone. The judgment in that case did not constitute a bar to the present action. The record in that case, put in evidence in this case, proves affirmatively that no evidence was given by the defendant therein in support of his answer setting up the defense of warranty. The defendant did not appear on the trial. The action



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was undefended. The only witness examined was the plaintiff; and it is not to be presumed that he gave any testimony touching the defense. The defense, therefore, was never submitted to the justice. A withdrawal of the answer by the defendant's counsel was quite unnecessary. In *Curtis v. Groat*, (6 John. 168,) evidence of the claim was given in the first action, and it was submitted to the jury. (See also *Felter v. Mulliner*, 2 John. 181; *Young v. Overacker*, *Id.* 191.)

In *Brockway v. Kinney*, (2 John. 210,) the first action was upon a note and an account, and evidence was given upon the claim, and a verdict was rendered for the amount of the note only. The second action was upon the account, and the plaintiff proved, by one of the jury that in the first action nothing was allowed for the *lime*. The plaintiff recovered, and the judgment was reversed upon the ground that the first judgment was a bar; the court remarking that the claim went to the jury on the first trial, and took its chance with them. If they did not allow it for want of sufficient proof, or for any other cause, it was the plaintiff's misfortune. In *Irwin v. Knox*, (10 John. 365,) the item had been submitted to the jury, in the first suit, and was rejected for want of sufficient proof. The judgment was a bar. In *Babcock v. Peck*, 4 Denio, 292,) the question was decided upon demurrer. The defendant pleaded that the plaintiff, in a former suit, had set off the demand and the cause was tried, &c. The plaintiff replied, denying that the alleged cause of action was *heard and determined* in the former case, as alleged by the plea. The court held the replication a good answer to the plea.

It can hardly be necessary to pursue this question further. The authorities are, that when the case is tried and the claim is submitted to the jury or the court, it cannot, in another action, be litigated. The pleadings may present the claim, but if no testimony is given in support of it, and it is not submitted to the court or jury, it will not

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be barred, unless it is a claim which the party is bound to present and litigate in that suit; as, in some cases, a set off in a justice's court. And whether the claim was litigated and submitted is a question which may be proved upon the trial of the second action. If the claim is embraced by the pleadings specifically, the presumption is that it was tried, and that it was submitted and passed upon. But the party alleging the contrary may prove that the claim was not litigated, and not submitted, but that the trial and verdict proceeded upon other grounds. If the record, as in this case, shows that the claim was not tried and submitted, no other proof is necessary. (See the opinion of brother DAVIS, in *Royce v. Burt*, 42 Barb. 663, *et seq.* and the cases there cited; *Wood v. Jackson*, 8 Wend. 9; *Lawrence v. Hunt*, 10 id. 80.)

The defendant's counsel made some objections, upon the trial, to the admission of evidence, and has by his points renewed some of these objections here. I have examined them, and am not satisfied that any of them are well founded.

The judgment of the county court must be reversed, and that of the justice affirmed.

[ERIE GENERAL TERM, May 4, 1868. *Daniels, Marvin* and *Davis*, Justices.]

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SAMUEL F. APPLETON vs. AMELIA WARNER, otherwise called  
AMELIA APPLETON.

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Where, in an action by a husband against his wife, to obtain a decree declaring void a marriage between them, for the reason that the defendant at the time of such marriage, had a husband living, and from whom she had never been divorced, the facts alleged in the complaint are undisputed, the marriage between the parties is absolutely void, and no court can hesitate to decree the nullity of the marriage.

"May" means "must," in statutes conferring powers upon courts in cases like this.

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Where the defendant is not the plaintiff's wife, and she admits the facts showing she is not, and does not claim to be such, the power to grant a counsel fee and alimony should not be exercised in her favor.

Should the court finally determine, as a matter of discretion, that it will not decree the nullity of the marriage, still there is no legal marriage. Still the defendant is not the plaintiff's wife. This being clear at the commencement of the controversy, the plaintiff is under no obligation to support the defendant or to pay her counsel.

**T**HIS action was brought by the plaintiff to obtain a decree of this court declaring void his marriage with the defendant, for the reason that she, at the time of such marriage, had a husband living and from whom she had never been divorced. The complaint also avers that the defendant expressed herself to be a widow, and concealed the fact that she had such living husband from the plaintiff. The answer of the defendant admits the marriage with the plaintiff; admits the former marriage with one Warner, and that he was living; admits that no children were born of the marriage of the parties to this action, and denies the other allegations of the complaint. After the issue thus made, the defendant applied at special term or chambers, for a counsel fee and alimony, and the application was denied. The defendant then applied, by motion, for leave to amend her answer, by inserting an allegation that she told the plaintiff, before her marriage with him, of the previous marriage with Warner, and of her ignorance whether he was living or dead; and that the plaintiff was insane at the time of the commencement of this action; and also for leave to renew her motion for counsel fee and alimony.

The motion was granted, as to the amendment, and a counsel fee of \$1000 ordered, and also alimony to the defendant at the rate of \$2500 per year, payable quarterly in advance. The plaintiff appealed from this order.

GEO. G. BARNARD, P. J. Courts have large powers of amendment of pleadings, if such amendment be "in fur-

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therance of justice." The papers show very clearly that the first subdivision of the amended answer allowed to be put in is false. Maria Warner told the defendant of the receipt of a letter from her husband, but a year before the marriage with the plaintiff, and the defendant then knew the fact that he was living, and where he was living, and said "she would not live with him if he should return from San Francisco."

The insanity of the plaintiff, at the commencement of the action, is not an insuable fact in the action. On the undisputed facts of this case the marriage with the plaintiff was absolutely void. (*Fenton v. Reed*, 4 John. 52. *Williams v. Parisien*, 1 John. Ch. 390.) Upon these facts, thus undisputed, no court can hesitate to decree the nullity of the marriage. "May" means "must," in statutes conferring powers upon courts in cases like this.

The power to grant a counsel fee and alimony should not have been exercised. The defendant is not the plaintiff's wife. She admits the facts showing she is not, and she does not claim to be. If the court finally determines, as a matter of discretion, that it will not decree the nullity of the marriage, still there is no legal marriage; still the defendant is not the plaintiff's wife. This being clear at the commencement of the controversy, the plaintiff is under no obligation to support the defendant, or to pay her counsel. It would be most pernicious to compel the support of an adulteress "out of the plaintiff's large estate until the ultimate decision takes place," which may be, and in such a case probably would be, for a very considerable time.

The plaintiff must strike out of his complaint, within ten days, the allegation of fraud on the part of the defendant in the consummation of the marriage with him.

The order is not just or right, and should be reversed.

INGRAHAM, J. concurred.

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Bloodgood v. Erie Railway Company.

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SUTHERLAND, J. If the plaintiff strikes out of the complaint the allegations of fraud and of fraudulent representations, I concur in reversal; otherwise I am for affirming the order.

Order reversed.

[NEW YORK GENERAL TERM, April 1, 1868. *Geo. G. Barnard, Sutherland and Ingraham, Justices.*]

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JOHN BLOODGOOD and others *vs.* THE ERIE RAILWAY COMPANY and others.

RICHARD SCHELL *vs.* THE ERIE RAILWAY COMPANY and others.

THE PEOPLE *vs.* THE ERIE RAILWAY COMPANY and others.

In the matter of the application of THE PEOPLE, &c. for the removal of Daniel Drew from office as director, &c. of the Erie Railway Company.

From an order to show cause, granted *ex parte*, returnable at a future day, and granting a temporary injunction pending the motion, no appeal will lie to the general term, until a hearing has been had on the original order to show cause, or on a motion to vacate or modify such order.

IN each of these cases an order to show cause was granted returnable at a future day, and a temporary injunction was granted pending the motion, in one of these cases, by Justice CARDOZO, and in the other cases by Justice BARNARD. In each case the order required cause to be shown before the justice granting the order in a place specially designated therein.

In the first three cases the order restrained the defendants, among other things, from the issue of certain bonds and stock of the Erie Railway Company, and from doing

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other things connected with the business of the company. In the last, the order restrained the defendant Drew from doing any act as a director of the company. These motions have not been heard or passed upon, but from the original orders to show cause and granting the injunctions therein the defendants respectively appeal.

*C. A. Rapallo and C. O'Conor*, for the plaintiffs.

*Jno. E. Burrill, D. D. Field and Jas. T. Brady*, for the defendants.

*By the Court*, INGRAHAM, J. I can see no ground upon which the appeals in these cases can be sustained. They are made from orders only temporary in their character, granted on *ex parte* applications, depending for their continuance on the decision of the court when the motions are heard, and forming in no way a decision such as is properly the subject of an appeal.

If during the temporary stay therein granted, the defendants desired to have the stay vacated or modified, they could apply to the judge granting the same for an *ex parte* order to that effect; or they could have moved before the justice at chambers, on notice, for such an order; but until a hearing has been had on the original order to show cause, or on such motion to vacate or modify the orders, no appeal will lie to the general term.

In *The Bank of Genesee v. Spencer*, (15 *How. Pr.* 142,) it was said: "To get rid of an order improperly granted by a judge, the remedy is a motion to set it aside."

In 5 *How. Pr.* (p.308,) the justice held that no appeal would lie from an *ex parte* order of a judge, made at chambers, to the general term.

The same rule was recognized in *Watt v. Watt*, (30 *How. Pr.* 345.) The judge says: "The order is not final, and therefore is not appealable."

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The appellants have referred to no authority sustaining their appeals, and they are so manifestly contrary to the intent of the Code in regard to such appeals, that it seems to be unnecessary to discuss the matter any farther.

The appeals in each of these cases, from these orders, must be dismissed, with \$10 costs.

[NEW YORK GENERAL TERM, April 6, 1868. *Geo. G. Barnard, Ingraham and Cardoso, Justices.*]

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In the matter of the petition of WILLIAM G. WOOD *et al.* to vacate the assessment for paving Third avenue in the city of New York.

Where the contract and specifications for paving an avenue did not provide for taking up the gutter stones and paving in their place, but on the contrary, required the contractor to readjust the gutter stones wherever necessary, without charge, and in violation of this he removed the gutter stones and substituted the pavement with the assent of the water purveyor, at the request of some of the owners; *Held*, that there was no authority for this, and it was outside of the contract.

It is erroneous for assessors to include in their assessment a charge for making the assessment.

It is irregular and erroneous for the commissioners of the Croton Water Board to certify the work to have been completed and accepted, when they have rejected the whole street for a distance of one block. The taking a bond to do the work, and withholding a part of the money will not obviate the difficulty.

Although the court does not, in a proceeding under the act of 1858, (*Laws of 1858, ch. 828*), inquire whether the work was well done, or done according to the contract, so far as relates to the material or workmanship, yet when it appears that the certificate was given with a full knowledge that the work was not finished, it is a violation of the contract which prohibits the contractor from receiving payment until the whole work is completed, and is unjust to the owners who are assessed for its payment.

*By the Court*, INGRAHAM, J. We have heretofore held that it was irregular, within the meaning of the act of

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1858, (*Laws of 1858, ch. 338*), to do several things which are complained of in this petition; among which are the following:

1st. The contract and specifications did not provide for taking up the gutter stones and paving in their place with Belgian pavement, but on the contrary required the contractor to readjust the gutter stones wherever necessary, without charge. In violation of this he removed the gutter stones and substituted the pavement, under the assent of the water purveyor, at the request of some of the owners. There was no authority for this, and it was outside of the contract.

2d. The assessors were wrong in including in their assessment a charge for making the assessment. This we held some time since to be erroneous.

3d. It was irregular and erroneous for the commissioners of the croton board to certify the work to have been completed and accepted, when they had rejected the whole street for a distance of one block. The taking a bond to do the work, and withholding part of the money, did not obviate the difficulty. That work has not been done to the time of the trial, and yet the owners have been assessed for it.

We do not, under this proceeding, inquire whether the work is well done, or done according to the contract, so far as relates to the material or workmanship; and if this were all, there would be no ground for our interference on that account; but when it appears that the certificate was given with a full knowledge that the work was not finished, it was a violation of the contract, which prohibited the contractor from receiving payment until the whole work was completed, and was unjust to the owners who were assessed for its payment.

The application should be granted, and the assessment vacated.

[NEW YORK GENERAL TERM, June 1, 1868. *Geo. G. Barnard, Ingraham and Sutherland*, Justices.]



In the matter of the application of THE COMMISSIONERS OF THE CENTRAL PARK, &c. for commissioners to lay out a road or drive between 59th and 155th streets, in the city of New York.

The act of the legislature, of April 24, 1865, entitled "An act to provide for the laying out and improving of certain portions of the city and county of New York," is not in conflict with the second section of the 10th article of the constitution of this state, because the power to make the application therein authorized, which by the act is vested in the Commissioners of the Central Park, should have been given to the common council of the city.

The authority conferred on the commissioners is not that of any local officer, nor does it authorize them to discharge the duties of any officer, but it provides for the discharge of a mere ministerial act, viz. presenting to the court a petition for the opening of a street. It is a mere authority to make an application to the court for the opening of a street; and that power may be conferred on the Commissioners of the Central Park.

The right to grade streets in the city of New York having always been exercised by the common council, as well as other powers conferred by that act on the commissioners, it may well be doubted whether the legislature can take from the common council this power and confer it on state officers.

*Per* INGRAHAM, J.

The legislature may lay out a road or drive by statute; and having that power, it may authorize others to do it.

No such road or drive could be laid out without the authority of the legislature; and whenever it has been necessary to open any new street or avenue not laid down on the map, such legislation has been deemed necessary, and the limits of the street or avenue have been fixed by the statute.

*Per* INGRAHAM, J.

Several instances specified in which such acts have been passed, without any action of the common council, where proceedings have been taken by other parties than the common council.

The limitation of four months within which the commissioners are required to complete their report, contained in the act of 1862, does not apply to a proceeding under the act of April 24, 1865, it being impracticable properly to complete such a work as is contemplated by the latter statute within that limitation.

It has been long since settled, and the rule has been uniformly acted upon by this court, that a mere error of judgment in the valuation of property taken for a street, is not the subject of review on a motion to confirm the report, unless the sum allowed was grossly inadequate and unequal as compared with other valuations, or unless some wrong principle was adopted as to the amount allowed.

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Under a provision in a statute directing how the commissioners shall be appointed, viz. by a notice specifying the time and place of making the application, and the nature and extent of the intended improvement, it is necessary that the whole extent of the intended opening should be stated in the notice. The owners are to be informed by it what property is to be taken. A reference to a map on file in some public office is not a compliance with the statute.

The fact that owners have, in some cases, appeared before the commissioners and claimed an allowance for their land, cannot give jurisdiction if it is not acquired in the mode prescribed by law.

The commissioners must be confined to the land which the notice describes as required for the improvement.

Where a statute authorizing the laying out of a road or drive described it as a road or public drive running from the northerly portion of the Sixth or Seventh avenues, &c. and to enter the Central Park at, &c. and to follow the course of the Bloomingdale road below 106th street, when the commissioners should deem such course advantageous, and provided that they should determine the location, *width*, courses, windings, &c. of said road; *Held* that the act did not authorize the taking of any land not required for the drive or road; and that the latter provision seemed to prescribe an uniform width to the road.

*Held, also*, that considering the intent of the statute to make a road of a uniform width, and the notice as given of such road, without referring to the gores outside of the road, there was no necessary authority for taking land outside of the lines of the road as laid out.

And where the notice not only did not include such gores, but virtually excluded them, by saying: "Said road or public drive is of a general width of one hundred and fifty feet, as shown on a certain map," &c.; *Held* that the commissioners had no jurisdiction to take such gores; and that so far as they were included in the proceedings, they were erroneously taken.

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**M**OTION to confirm the report of the commissioners appointed to acquire land for the widening and laying out of the Bloomingdale road, or Broadway, between Fifty-ninth and One hundred and Fifty-fifth streets in the city of New York; the road to be of a general width of one hundred and fifty feet.

*Richard O'Gorman and William Fullerton*, for the motion.

*Abraham R. Lawrence, Jr.* for the objector, *Rudolph A. Witthaus*, presented the following points in opposition to the confirmation of the report:

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I. The act of April 24, 1865, entitled "An act to provide for the laying out and improving of certain portions of the city and county of New York," under which the proceedings herein were initiated, and the commissioners of estimate and assessment herein were appointed, is in conflict with the second section of the tenth article of the constitution of this state, because it takes away from the mayor, aldermen, and commonalty of the city of New York, and the officers of said corporation, the power of determining the location, width and extent of a public road or drive in said city, and of the other streets, roads, squares and places in said act mentioned, and of laying out the same, and of acquiring title thereto, and transfers the same to the Commissioners of the Central Park, which said commissioners are officers who are not elected by the electors of the said city or county, nor appointed by the authorities thereof. (*Laws of 1865, p. 1136.*) See as to appointment of the Central Park commissioners, *Laws of 1857, vol. 2, p. 715; of 1859, p. 857; of 1861, p. 164; of 1866, vol. 1, p. 822, § 8.*

(a.) The second section of the tenth article of the constitution reads as follows:

"§ 2. All county officers whose election or appointment is not provided for by this constitution, shall be elected by the electors of the respective counties, or appointed by the boards of supervisors or other county authorities, as the legislature shall direct.

All city, town, and village officers, whose election or appointment is not provided for by this constitution, *shall be elected by the electors of such cities, towns and villages, or of some division thereof, or appointed by such authorities thereof as the legislature shall designate for that purpose.*

All other officers whose election or appointment is not provided for by this constitution, and all officers whose offices may hereafter be created by law, *shall be elected by the people or appointed as the legislature may direct."*

(b.) It was decided in the case of *The People ex rel. Wood*

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v. *Draper*, (15 N. Y. Rep. 532,) that the above section, so far as it limits the power of appointment, or the election of city or county officers to the authorities of the city or county, or to the electors thereof, only applied to city and county officers in existence at the time of the adoption of the constitution of 1846. But it was also held in that case that it was not enough to take a case out of the provisions of the above section that the *names of officers existing when the constitution was adopted, were afterwards changed by an act of the legislature, or their functions colorably modified*. That the constitution regarded substance, not form. (*Per Denio, Ch. J. p. 539. See also People v. Raymond, Transcript, March 28, 1868.*)

(c.) This objector insists that the powers and duties which by the act of 1865, before referred to, are sought to be vested in the Commissioners of the Central Park were, at the time of the adoption of the constitution of 1846, confided to the mayor, aldermen and commonalty of the city of New York, and to the officers of said corporation. The 177th section of the act of April 9, 1813, entitled "An act to reduce several laws relating particularly to the city of New York into one act," after providing that the mayor, aldermen and commonalty may take proceedings to have the streets, roads, &c. opened, *which were laid out by the commissioners of streets and roads, appointed under the act of 1807*, goes on to provide as follows:

"And whenever and as often as it shall, in the opinion of the said mayor, aldermen and commonalty, in common council convened, be necessary or desirable for the public convenience or health, to lay out, form and open any street or streets, or public place or places in any part of the said city not laid out into streets, squares and public places, by the commissioners of streets and roads in the city of New York, under and by virtue of the act aforesaid, or to extend, enlarge, straighten, alter, or otherwise improve any street or streets, or part of a street, or public place or

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places already laid out or hereafter to be laid out, and formed or opened in any part of the said city not laid out into streets, avenues, squares and public places by the commissioners aforesaid, it shall be lawful for the said mayor, aldermen and commonalty of the city of New York to order and direct the same to be done, and to cause the same to be done accordingly in such manner as they shall think most advisable." (*See act of 1813, § 177; Davies' Laws, p. 528. See also Davies' Laws, p. 534.*)

This objector contends that the transfer of these powers to the Commissioners of the Central Park, under the construction given by the Court of Appeals, in the case of the *People v. Draper*, (*supra*,) and in other cases which have followed that case, to the section of the constitution above referred to, is not within the powers of the legislature. He does not deny that it would be competent for the legislature to transfer the powers in question to other officers than the mayor, aldermen and commonalty of the city of New York, but insists that the officers, to whom such transfer is made, must be either elected by the electors of the city or appointed by the local authorities. The powers sought to be given to the Commissioners of the Central Park were, prior to 1846, exercised solely by local officers, and the case falls precisely within the provisions of the constitution relative to local officers. (*People v. Draper*, 15 N. Y. Rep. 532. *People v. Raymond*, 37 N. Y. Rep. 428.)

II. Even assuming that the legislature had the constitutional power to confer upon the Commissioners of the Central Park the authority given to said commissioners by the act of 1865, the objector contends that the said commissioners had no right, *in this proceeding*, to take the property belonging to him, which is shown upon the diagram annexed to the objections filed by him. (*a.*) It will be perceived, by reference to the first section of the act of 1865, that the powers of the Commissioners of the

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Central Park, as to laying out "*public squares and places*," are limited to that part of the city of New York which is northward of the southerly line of One Hundred and Fifty-fifth street. Below One Hundred and Fifty-fifth street, they have power, under that act, to lay out a road or drive, not a public square or place. Now, the triangular piece of property belonging to the objector in no just sense can be said to be a part of the road or drive laid out by the commissioners. It will be a public place, but not a road or drive. Although, then, the commissioners may have since acquired the right to acquire lands for public places, this proceeding being based on the act of 1865, and taken *for the opening of the road mentioned in that act*, the powers of the commissioners must be determined by that act. If it should be said that under the act of 1865, the commissioners have a discretionary power to determine the location, width, courses, windings and grades of such road, &c. the answer is, that it must clearly appear that there has been something like a reasonable exercise of that power; and that under the pretense of laying out a road or drive, the laying out of squares and public places cannot be accomplished. The two powers are distinct and separate. (*Laws of 1865, p. 1136. Sharp v. Speir, 4 Hill, 76. Sharp v. Johnson, Id. 92.*)

III. Under the provisions of the first section of the act entitled "An act to prevent fraud in the opening and laying out of streets and avenues in the city of New York," passed April 24, 1862, the commissioners of estimate and assessment are required to complete their proceedings within four months from the time of their appointment, unless further time is allowed for that purpose by the Supreme Court. (*Laws of 1862, p. 967. Laws of 1865, p. 1138.*)

IV. The award made by the commissioners of estimate and assessment for the property of this objector is grossly inadequate, and far below the actual value of the same.

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The affidavits presented on the part of the objector make it quite apparent that the sum of \$24,000, the amount finally allowed by the commissioners for the property in question, does not approximate to the value of such property.

V. The commissioners have, however, awarded to the objector \$21,000 less than the lowest valuation specified in any of the above affidavits. The objector submits that with such affidavits before the court, he brings his case within the rule allowing the court to send back a report when it is strongly against the weight of evidence. It is not, of course, known to the objector, nor can it be until this case is actually argued, whether any, and if so what, or how many, affidavits will be presented by the commissioners to sustain their report; but he confidently submits that whether such affidavits are few or numerous, the experience, character and reputation of the men who have made affidavits in support of his objections, justifies him in asking the court to weigh well those affidavits, and not to sustain the commissioners in awarding him a sum which is but little more than one half of the lowest amount specified in those affidavits as the value of his land.

VI. But the commissioners have erred in the principle upon which they have acted in arriving at the value of the objector's land; and on that ground he asks that the report may be sent back to them. Their error consists in this: They have not taken into account the fact that the land of the objector is all front, and have allowed him no more per square foot than they have awarded for other lands having only one or two fronts. For any error in the principle of valuations it is well settled that the report of the commissioners will be recommitted to them. (*Matter of Furman street*, 17 Wend. 649.)

VII. The commissioners, in making their award to the objector, have evidently overlooked the fact that the

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entire property of the objector is taken for the proposed improvement, and that no residue is left to him to be benefited by the improvement. The owners of the parcels who have received greater proportionate awards than the objector, have a residuum remaining which is much enhanced in value. Yet no allowance has been made for this fact by the commissioners.

VIII. Again, the taking away of the objectors's property has proportionately increased the value of the adjacent lots on the Tenth avenue, and it is submitted that a portion of that increase should be credited to the objector in making his award.

IX. The objector does not deny the well settled principle that the determination of the commissioners is entitled to great weight upon a mere question of value, but he confidently insists that where the difference between the valuation of the commissioners and of the witnesses for the owner is so great, he is entitled to the benefit of every doubt which the court may have as to the justice of the award. He does insist that it is clear that in this case there has been error in principle committed by the commissioners in making the award to him; and he therefore asks that the report made be re-committed to the commissioners for the purpose of revision and correction.

*Ira Shafer*, for objectors Campion, Clark and Grove, relied upon the constitutional points presented by the counsel for Witthaus, and objected to the awards made by the commissioners, as inadequate.

*Mr. O'Gorman*, in reply to the contestants. I. As to the objections of Rudolph A. Witthaus. It is objected that the act of April 24, 1865, (*Laws of 1865, ch. 565*), under which these proceedings have been brought, violates section 2, article 10, of the constitution of this state. This ques-



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tion was raised and determined in "The matter of the Central Park." (16 *Abb.* '56.) In that case and the case at bar, the objection was the same, urged by the same counsel, and overruled by Judge INGRAHAM.

II. The duties devolving on the Commissioners of the Central Park under chapter 565, Laws of 1865, never did devolve on the mayor, aldermen, and commonalty of the city of New York, under the law of 9th April, 1813, and were not imposed on them at the time of the adoption of the constitution of 1846. The 177th section of that act cited by counsel for Witthaus, (*see his first point,*) empowers the mayor, &c. to *open* streets which *had been laid out* by the commissioners appointed under the act of 1807, and also to *lay out* and open any street or public place in any part of the city *not* laid out in streets, &c. under said act of 1807. But there is no part of the city above Fourth street which was not laid out in streets, etc. by said commissioners under said act; and, therefore, as to all that region, including the locality affected by the proceedings which are now before the court, the mayor, etc. had acquired no powers and assumed no duties by virtue of the act of 1813, save that of applying to the Supreme Court for the appointment of commissioners to *open* streets already laid out. But as to *laying out* a new street or public place in the said district, they had no power whatever. Whenever, therefore, it has seemed expedient to *lay out or open a new street* in that part of the city, it has become necessary to apply to the legislature for power to do so. This course was adopted in the case of Madison avenue, which, not having been laid out by the commissioners under the act of 1807, was laid out and opened by virtue of an act of the legislature. (*Laws of 1860, ch. 466.*) The same course was adopted as to the extension of Fifty-fourth, Fifty-fifth and Fifty-sixth streets. (*Laws of 1857, ch. 73.*) 1. Also in the proceedings under the act of 1853, to take the park itself. (*Laws of 1853, p. 1167.*) 2. In the proceedings

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confirmed by the court in taking the land from One Hundred and Sixth to One Hundred and Tenth street for the extension of the park. 3. In the widening of Seventh avenue under the act of 1864. (*Laws of 1864, p. 637.*) 4. In the widening of Sixth avenue under the act of 1865. (*Laws of 1865, p. 113.*) 5. In the acquisition of lands by the Croton Aqueduct Board. (*Laws of 1849, p. 540, § 14.*) 6. In the acquisition of lands by the Croton Aqueduct Board, in behalf of the mayor, aldermen and commonalty, for a new reservoir. (*Laws of 1853, p. 961.*) 7. In the acquisition of lands by the Croton Aqueduct Board in Westchester county, etc. (*Laws of 1865, p. 446.*) 8. In the acquisition of lands by the Croton Aqueduct Board for a reservoir at High Bridge. In at least six of the above cases, proceedings instituted under exactly the same circumstances, and under laws precisely similar to the one under which the present proceedings are instituted, have been confirmed by this court, and at least three of these have been confirmed at general term. The same course has been adopted in the case at bar—the Boulevard, &c. authority for laying out which is derived from a special act of the legislature, under which these proceedings have been instituted, and without which the mayor, &c. would have been utterly powerless. The cases cited by the counsel for Witthaus, therefore, sustaining the proposition that the legislature cannot devolve on officers not elected by the people, or appointed by the local authorities, &c. power to discharge duties theretofore discharged by the mayor, &c. are not in point. The powers given to the Central Park commissioners by the act of 1865, were not prior to 1846, exercised by local officers. In further development of this view the following more detailed statement of the proceedings heretofore had in these matters, is submitted to the court. The power of laying out and opening streets is not a power of such nature that the legislature cannot transfer it; it is not one of the ordinary

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functions of municipal government. The legislature has continuously, for more than a century, passed laws directing the manner of laying out streets and roads, and of permitting the common council to do it. These include streets in the part of the city *not* laid out by the commissioners of 1807, as well as that part *laid out* by them north of, say Fourth street. Among these acts are those laying out Hudson street from Greenwich lane to Ninth avenue, Fifth avenue from Twenty-third to Thirty-first street, Twenty-fourth, Twenty-fifth, Twenty-sixth, Twenty-seventh, Twenty-eighth, Twenty-ninth, and Thirtieth streets, from Fourth avenue to Sixth avenue, Stuyvesant street, from Bowery road to Second avenue, Irving place and Lexington avenue, Madison avenue, the Bloomingdale road, or Broadway, from Twenty-first street to Eighty-sixth street, Wooster street or University place, from Eighth street to Fourteenth street, Manhattan and Lawrence streets, Fourth avenue, (widening,) Union place, Tompkins square, Madison square, Mount Morris square. It is true as stated by the objector, that section 177, of chapter 86, of Revised Laws of 1813, gives power to the mayor, aldermen, and commonalty of the city of New York, whenever and as often as it shall, in their opinion, "be necessary or desirable for the public convenience or health, to lay out, form, and open any street or streets, or public place or places, in any part of the said city, *not* laid out into streets, avenues, squares, and public places by the commissioners of streets and roads, in the city of New York, under and by virtue of the act aforesaid." (*Act of April 3, 1807.*) "To extend, enlarge, straighten, alter, or otherwise improve any street or streets, or part of a street, or public place or places, already laid out or hereafter to be laid out, and formed or opened in any part of the city *not* laid out into streets, avenues, squares, and public places by the commissioners aforesaid," but the previous portion of the same section which is not quoted by the objector,

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clearly shows that in the part *laid out* by such commissioners, the mayor, aldermen, &c. had no such power. The common council *has never assumed* to lay out, extend, enlarge, straighten, or alter any street, avenue, square, or public place, *above or north of, say Fourth street, since the passage of the act of 1807, except under special legislative authority first obtained therefor.* It is believed that no exception exists to this rule. The action of the common council from the year 1807 to the present time, so far as laying out streets, avenues, &c. above, say Fourth street, has been consistent with the 8th section of act of April 3, 1807, which declares "That the plans and surveys of the said commissioners, or any two of them, in respect to the laying out of streets and roads within the boundaries aforesaid" "shall be final and conclusive, as well in respect to the said mayor, aldermen and commonalty as in respect to the owners and occupants of lands, tenements and hereditaments, within the boundaries aforesaid, and in respect to all other persons whomsoever." So completely has the common council not only regarded itself, but also, so completely has it been, without power or authority to lay out streets, avenues, squares, or public places, within the boundaries *laid out* under the act of 1807, that in the case of the present Tompkins market and Hall street adjoining it, and extending from Sixth to Seventh street, *although the corporation owned the land in fee simple, they did not attempt to lay out the street* until the act authorizing it to be done had been obtained. (*See Laws of 1829, ch. 267.*) So also in relation to Stuyvesant square and Rutherford and Livingston places, although the cession of the land for the whole improvement was offered, they declined to accept it until an act was passed authorizing the laying out of the square and the streets. (*See Laws of 1836, ch. 361.*) The road or public drive now in controversy, is between Fifty-ninth street and One Hundred and Fifty-fifth street, and wholly within that part of

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the city which *was* most regularly and thoroughly laid out into streets and avenues by the commissioners appointed by and acting under the act of April 3, 1807. The legislature has in frequent cases authorized and directed certain persons to lay out streets, roads, avenues, squares, and public places in the city of New York, and declares that they should have exclusive power to do so, and that the plans and surveys made by them should be final and conclusive. The act of April 3, 1807, which was passed at the request of the mayor, aldermen, and commonalty, appointed Simeon De Witt and others to lay out all the city north of, say Fourth street, of the city of New York, and provided that the plans so made "should be final and conclusive against the mayor," &c. (*See minutes of common council, February 16, 1807.*) Chapter 103 of Laws of 1809, appointed Simeon De Witt and others to lay out Canal street, in the city of New York, and declared their plan should be final and conclusive. Chapter 201 of Laws of 1860, appointed James C. Willet and others, commissioners, to lay out that part of the city north of One Hundred and Fifty-fifth street, and to make alterations below One Hundred and Fifty-fifth street, and gave them exclusive power to do so, and declared that their plans should be final and conclusive. By act of 1865, chapter 565; of 1866, chapter 367; of 1867, chapter 697, the Commissioners of the Central Park have been empowered and directed to lay out streets, avenues, roads, public squares and places, in all the part of the city north of Fifty-ninth street, and west of Eighth avenue, and also within a space three hundred and fifty feet in width surrounding the Central Park, as well as to lay out the avenue St. Nicholas, and extend and widen Manhattan street, and all these acts declare that the maps, plans, and surveys made, shall be final and conclusive.

The legislature has often authorized boards or persons

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to acquire title to lands required for public purposes, in the name and on behalf of the mayor, aldermen, and commonalty of the city of New York. The following are some of the cases in which this has been done: Chapter 103, Laws of 1809, appointed Simeon De Witt and others to take the lands required to make Canal street. Chapter 256 of Laws of 1834 authorized the water commissioners for the city of New York to acquire title to land required for the Croton aqueduct, and chapter 328, of Laws of 1837, conferred similar powers on them in relation to alterations in the route of the Croton turnpike.

The Croton Aqueduct Board, by chapter 383, of Laws of 1849; chapter 501, of Laws of 1853; chapter 449, of Laws of 1860; chapter 265, of Laws of 1865, were authorized for and in behalf, and in the name of the mayor, &c. to take possession of and use, and acquire title to land, real estate, and property required for laying mains, constructing reservoirs, gate houses, &c.

The Board of Commissioners of the Central Park, by chapter 101, Laws of 1859; chapter 564, Laws of 1865; chapter 565, Laws of 1865; chapter 367, Laws of 1866; chapter 657, Laws 1866; chapter 697, Laws of 1867, are authorized, empowered, and directed, for and in the behalf and in the name of the mayor, aldermen, &c. to take proceedings to acquire title to the lands required for the extension of the Central Park, the lands required for the streets, roads, public squares and places, laid out by them under several laws; also for the widening and opening of Sixth avenue, the avenue St. Nicholas and Manhattan street, as also all streets and avenues laid out under act of April 3, 1807, north of Fifty-ninth street.

More than twenty miles of streets have been laid out under the act in question, and still more under other similar acts. Inextricable confusion will be created in relation to purchases and sales of real estate, made by individuals on the lines of such streets during the past two

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years, if the proceedings had in full faith of the validity of the laws are not sustained. These miles of streets are not, it will be recollected, laid out through farm lands, but through city lots, whose value is estimated by the square foot rather than by the acre. Are these layings out to such an immense extent to be disturbed, and the numberless small ownerships fronting on them to be depreciated in value, and deprived of access, in order that one objector may get a sum for his lands greater than that awarded him by intelligent, disinterested sworn valuers?

III. The court will remember that the streets of the city of New York are not the property of the corporation as such, but after the land for them is acquired, they are held in trust for the whole people of the state. (*See People v. Kerr*, 27 N. Y. Rep. 188.) The legislature has from time immemorial delegated the power to acquire property by eminent domain to corporations, *e. g.* railroad corporations, turnpike companies; to quasi corporations, *e. g.* boards of supervisors; to officers by title of office, *e. g.* the corporation counsel by act of 1853, and the Croton Board, and the Central Park by various acts before cited, and to individuals, as in the case of Canal street. This power is exercised not in the interest of the corporation alone, but of the whole people of the state, in trust for whom the property when acquired will be held. The motion is made to confirm the report, in the name of the mayor, aldermen and commonalty, by their law officer, the counsel to the corporation, who is specially directed by law to do so, and no objection is presented by the mayor, aldermen and commonalty.

IV. There is no distinction between the powers of the Central Park Commissioners as to *streets and public places* under the act of 1865. (*Ch.* 565, *p.* 1136.) Section 1, in terms, covers "streets, roads and public places," and the court having determined in 16th *Abbott* that the power given to the commissioners to open the Central Park was

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constitutional, the decision applies with equal force to "roads and streets."

V. The court will take judicial notice that all the city north of Fourth street, within the limits affected by this proceeding, was laid out in streets and avenues by the commissioners appointed under the act of 1807; otherwise affidavits to that effect can be supplied.

VI. The objection that the wedge of land owned by the objector Witthaus cannot be necessary for "a road or drive," but if taken in this proceeding would form a "public place" is without force. Under section 1, of the act of 1865, the Commissioners of the Central Park are empowered "to determine the location, width, courses, &c. of said road and may widen Bloomingdale road," &c. They have exercised that power in this case, and the road so widened includes the lots of the objector. It is to be presumed that in so doing they have exercised a reasonable discretion, the opinion of the objector to the contrary notwithstanding; there is nothing in the act requiring the road to be of a uniform width; it may be of varying width.

VII. As to the objection that the commissioners should have completed their report in four months from the time of their appointment, the answer is simple: *First.* This proceeding is under a special act of the legislature of 1865, providing a new and independent scheme for laying out streets, and is not governed by the provisions of the former act of 1862, which is quoted to sustain this objection. The act of 1862 refers only to the altering or opening of streets or avenues then existing. *Second.* Even if it were otherwise, it is in the discretion of the court to allow further time, and they can do so now, if they think proper.

VIII. A suggestion from the court deserves attention. The notice and petition in this matter, refer to a map filed in the park commissioners' office, and accessible to all, also filed in the register's office, and office of the secretary



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of state. The petition refers to the same map, and a copy of the map is annexed. This reference sufficiently designates the space, title to which was to be acquired in the proceeding, and no one interested could be misled thereby.

IX. The time for making objections to the authority of the commissioners of assessment, &c. in this matter has gone by. The counsel to the corporation, on behalf of the mayor, &c. and in obedience to the law of 1865, made application to the Supreme Court for the appointment of commissioners. Ample notice to all parties owning property to be affected by this matter was given by publication thereof in certain newspapers, according to law. No objection was made on the part of Mr. Witthaus to that application, and the commissioners herein were thereupon appointed. In the performance of their duties they adjudicated upon the claims of Mr. Witthaus. These claims were presented by him to them, without any objection on his part as to their authority to pass upon the same. He now, by his counsel, appears before the general term, which holds in these matters the position of an appellate court, and presents to it a plea to the authority of the inferior tribunal before which he voluntarily and without any objection discussed his claim. This course is in violation of all principles of sound logic. "*Consensus tollit errorem.*" (*Broom's Legal Maxims.*)

X. The commissioners of estimate and assessment were appointed to examine and decide such questions; to hear evidence; view the land, and ascertain all the facts and opinions which could throw a light on the subject. They have done so and decided. Again, on receipt of the written objection of Witthaus, they further discussed the matter, and raised his award as far as they deemed it expedient to do. This court, sitting at general term, cannot possibly reverse their decision without a thorough examination of all the grounds on which it was formed, without, in fact, doing all, hearing all, seeing all that the

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commissioners have done, heard and seen. The affidavits of the objector and his friends do not agree with one another. One values the property at \$60,000, another \$45,000. All these values are merely speculative. The affidavits produced by the commissioners are more likely to be disinterested and reliable. But the whole subject is out of the reach of the court. No error of law has been committed by the commissioners, and the court cannot review their decision on a mere question of fact.

XI. But even were it proper for the court to reverse the action of the commissioners in making the awards complained of, it can be satisfactorily shown that the objections to the awards are unreasonable and unjust. As to the objections four, five and six, that the award to the objector Witthaus is inadequate, and a violation of the principle which should have governed the commissioners, counsel submits the following remarks and statements: The true way to regard the award, so as to judge whether all the elements of value of the land taken have been considered, is to compare the award for land similar in other respects in the same neighborhood.

XII. For the above reasons it is submitted that no error in law or fact has been committed in these proceedings, and that the report of the commissioners should be in all respects confirmed.

*Mr. Lawrence*, in reply to the points of the Commissioners of the Central Park. I. It having been asserted by one of the counsel moving for the confirmation of the report in this matter, that the mayor, aldermen and commonalty of the city of New York, and their officers, never had the power which is sought to be conferred upon the Central Park commissioners by the act of April 24, 1865, and under which this proceeding is taken, it becomes important to state their powers more fully than was done upon the points heretofore presented by the objector.

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And first we say, that the mayor, aldermen and commonalty were vested with such powers by the Montgomerie charter. (*See Charter*, § 16.) There could not be a broader or more comprehensive grant of power in reference to streets and highways in any and every part of the island of Manhattan, than is contained in this section.

II. In the next place we say, that the design of the legislature evidently was, by the act of 1813, to provide a general scheme for the laying out of streets, avenues, &c. in the city of New York, and to confer upon the mayor, &c. and their officers, full power and authority to take all proceedings which might be necessary for the acquisition of the title to the lands required for such purpose, and for the subsequent improvement, regulation, grading, paving and repairing of the same. (*See act of 1813*, § 177; *Davies' Laws*, pp. 527, 528 and 529.) In reference to this section we may say that, taken in connection with the ample powers already conferred upon and vested in the mayor, &c. of New York, by the Montgomerie charter, the whole power of opening, laying out, grading, etc. of streets in the island of Manhattan, was conferred upon the city authorities. 1st. The first part of the section confers the power to make application for the opening of any street, avenue, &c. *laid out* by the commissioners appointed under the act of 1807. 2d. The second part of the section confers the power to *lay out, form, and open any street or streets*, or public place or places, in any part of the city *not laid out* by the commissioners of streets and roads, &c. and to make the necessary applications for acquiring the lands therefor.

III. The powers above referred to are local powers, and have, ever since the organization of the government of this state been recognized as such. We are thus brought down to the question, whether the act of 1865 is in conflict with the section of the constitution set forth in our previous points. In examining this question, we cannot

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do better than to refer to the recent opinion, delivered by Judge Grover, of the Court of Appeals, in rendering the decision of that court, in the case of *The People v. Raymond*, deciding that the act of 1857, chapter 410, authorizing the appointment of commissioners of taxes and assessments by the governor and senate, was in conflict with the provisions of the section of the constitution above referred to. (*See Laws of 1865, p. 1138, §§ 1, 4.*) By these sections the Central Park commissioners have exclusive power to lay out streets, roads, public squares and places, northward of the southerly line of One Hundred and Fifty-fifth street. This is a part of the city *not laid out* into streets, &c. by the commissioners of 1807. Their plan only extended to One Hundred and Fifty-fifth street. Now, by the act of 1813, the corporation of the city had full power "to lay out, form, and open any street or streets, or public place or places, in any part of the said city *not laid out* by the commissioners of streets and roads," appointed under the act of 1807, and to make application to the court for taking the lands required therefor. (*See § 177, supra.*) These are precisely the powers which are now sought by the act of 1865 to be given to the Commissioners of the Central Park.

IV. If it should be said that the public road or drive, which forms the subject of this proceeding, is bounded by One Hundred and Fifty-fifth street and Fifty-ninth street, and, therefore, it is within the section of the city which was laid out by the commissioners of streets and roads, we answer that, 1st. We conceive that, under the provisions of the section of the Montgomerie charter, above set forth, the corporate authorities possessed the power to lay out and form such a road or drive in the section of the city laid out by the commissioners aforesaid. (*Charter, § 16, supra.*) 2d. That the powers conferred by the act of 1813 are merely cumulative to those granted by the Montgomerie charter, and that said act does not take

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away the rights granted by the charter. 3d. That the whole charge of the proceedings in the city of New York, relative to opening streets therein, having been committed to the mayor, &c. by the act of 1813, the power was a local function, which was preserved to the city by the constitution of 1846. 4th. That the act of 1865 presents a general system, scheme or plan of improvement, and that the different parts of such plan and scheme are so interwoven, that they cannot be separated; and if the act is unconstitutional as to one part of the scheme, it is void as to the whole.

V. Again, the 8th section of the act of 1865, confers upon the Commissioners of the Central Park power, "from time to time, to cause such of said streets, roads, squares or places, as they may designate for that purpose, to be regulated, graded and improved as streets, or as country roads, or in such manner as the said commissioners may deem for the public interest, and may direct, and for that purpose, and in and about such regulating, grading and improvements the Commissioners of the Central Park shall have power and enjoy all the powers now or heretofore possessed, enjoyed or exercised by the mayor, aldermen and commonalty of the city of New York as to other streets and roads, and by such commissioners in respect to the Central Park in said city," &c. The 175th section of the act of 1813 provides as follows: "That it shall be lawful for the said mayor, aldermen and commonalty to cause common sewers, drains and vaults to be made in any part of the said city, *and to order and direct the pitching and paving the streets thereof*, and the cutting into any drain or sewer, and the altering, amending, cleansing and scouring of any street, vault, sink or common sewer within the said city; and the raising, reducing, leveling or fencing in any vacant or adjoining lots in the said city, and to cause estimates of the expense of conforming to such regulations to be made, and a just and

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equitable assessment thereof among the owners or occupants of all the houses and lots intended to be benefited thereby, in proportion, as nearly as may be, to the advantage which each shall be deemed to acquire." (*Davies' Laws*, p. 526.) The act of 1865 distinctly transfers the powers of the corporation, relative to regulating and grading streets above One Hundred and Fifty-fifth street, to the Commissioners of the Central Park. It seems clearly to follow, then, that the act of 1865 is unconstitutional, because it takes away from the mayor, aldermen and commonalty of the city of New York, local functions and powers which they were in possession of, and exercised long prior to the adoption of the constitution of 1846, and transfers them to the Commissioners of the Central Park, who are officers appointed by the legislature, officers in whose appointment neither the electors of the city nor the local authorities had any choice. (*Laws* 1857, vol. 2. p. 715. *Id.* 1859, p. 857. *Id.* 1861, p. 164. *Id.* 1866, vol. 1, p. 822, § 8.)

VI. As to the case of the Central Park extension, (16 *Abb.* 56,) it is only necessary to observe, 1st. That it was decided before the decisions in the recent cases in the Court of Appeals, construing the section of the constitution which we refer to, and defining the powers and rights of localities under that section. (*People v. Raymond*, (37 *N. Y. Rep.* 428. *Devoy v. Mayor*, &c. 36 *id.* 449; and see *opin. of Ingraham, J. in People v. Board of Metropolitan Police*, 33 *How.* 52, 61; and see *Judge Smith's*, in same case, p. 62.) 2d. That it was a decision made at special term, and although entitled to great respect, is not controlling at general term. 3d. That the main point discussed in that case was as to the legality of the appointment of the Central Park commissioners themselves.

VII. The objector Witthaus had no such notice of the application for the appointment of the commissioners of estimate, and of the nature and extent of the improve-

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ment as was contemplated by the statute. (*Laws 1839, p. 183.*) The notice states that the said road or public drive is "to commence at the junction of Bloomingdale road, or Broadway, Eighth avenue and Fifty-ninth street, running thence northerly or northeasterly, and following the general course of Bloomingdale road or Broadway, to the northerly side of Eighty-seventh street, etc. \* \* \* Said road or public drive includes the whole of said Bloomingdale road or Broadway, between Fifty-ninth and One Hundred and Seventh streets, except a portion thereof between Seventy-fifth and Seventy-seventh streets, and another portion thereof between Eighty-sixth and One Hundred and Fourth streets, in the city of New York; said road or public drive is of a general width of one hundred and fifty feet, as shown and delineated on a certain map of the same, made by Gardner A. Sage, city surveyor, and now on file in the office of the Commissioners of Central Park." The land of Mr. Witthaus borders on Broadway, but to take it for the proposed improvement the commissioners, instead of laying out the road or public drive on the general course of Bloomingdale road, have turned off their line at right angles, or nearly so. There is nothing on the face of the notice to advise Mr. Witthaus that the road was to be more than one hundred and fifty feet in width at the point where his property was situated. The reference to the map on file in the office of the Commissioners of the Central Park, does not obviate this defect, because the act of 1839 requires that "the notice shall specify the nature and *extent* of the intended improvement." (*Laws 1839, § 2, p. 183.*) The notice in this case does not state the *extent* of the improvement, and it is also calculated to mislead the parties interested as to the *nature* of the improvement. The proceedings being statutory, the power sought to be exercised under the statute must be strictly followed. (*Sharp v. Spier, 4 Hill, 76. Sharp v. Johnson, Id. 92. Rathbun v. Acker, 18 Barb. 393.*)

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VIII. There was no answer made on the argument to the point that under the provisions of the act of 1862, entitled "An act to prevent fraud in the opening and laying out of streets and avenues in the city of New York," the commissioners were bound to complete their proceedings within four months from the time of their appointment unless further time is allowed by the Supreme Court except that the act did not apply to this case. (*Laws of 1862, p. 967.*) We answer that it does apply to this case, and is made applicable to it by the act of 1865. (*Laws of 1865, p. 1138.*) That the act of 1862 is referred to in these proceedings as being one of the acts under which they are taken.

IX. The objection in the counsel's ninth point, that it is too late for Mr. Witthaus to object to the authority of the commissioners for the reason that he appeared before them and argued his objections there, is not well founded in reason or in law. The objection to the jurisdiction of the commissioners was taken in the objections filed by the objector. If we are right in the supposition that the act of 1865 is unconstitutional, it is a *mere nullity*, and no jurisdiction can be acquired under it. Where a tribunal has no jurisdiction of a subject matter, no consent of parties can confer such jurisdiction. (*Dudley v. Mayhew, 3 Comst. 10. Davis v. Packard, 6 Peters, 276. Coffin's ex'rs, v. Tracy, 3 Caines, 128. Lindsley v. McLelland, 1 Bibb. 262. Heyer v. Burger, Hoff. Ch. 1. Beach v. Nixon, 5 Seld. 35.*) The objection to the jurisdiction can be taken at any time. (*Garcie v. Sheldon, 3 Barb. 232. People v. Clerk of N. Y. Marine Court, 3 Abb. 309.*)

X. The counsel, by his second point, admits that under the act of 1813 the Mayor, &c. had power to open streets in that part of the city *not* laid out under the act of 1807. As we have stated in our first point, (subdivision c.) the commissioners of 1807 only laid out the city to One Hundred and Fifty-fifth street. (*See Report of Commissioners,*



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*Davies*, 438.) *See Map of Commissioners*, 1807.) The counsel is in error in supposing that the whole of the city was laid out above Fourth street. As far, then, as the power to lay out streets, &c. above One Hundred and Fifty-fifth street is concerned, the act of 1865 is in conflict with the constitution of 1846, and as the act of 1865 consists of one general scheme or plan, one part of which is void, the whole must fall.

The practical effect of the acts referred to by the learned counsel, enlarging the powers of the Commissioners of the Central Park, is to abolish the mayor, aldermen and commonalty of the city, so far as the streets are concerned, between Fifty-ninth street and the northern limit of the island, and to substitute the park commissioners in their place. This is a change of the gravest and most serious character, not to be upheld, unless clearly within the powers of the legislature, and clearly in accordance with the constitution.

If there is any vitality in the Montgomerie charter, any force in the solemn confirmations of that charter which have from time to time been made by the state, all the powers now sought to be intrusted to the park commissioners have been lodged in the corporate authorities for nearly two centuries, and it would be far more reprehensible to sustain legislation which nullifies that charter than to declare such legislation to be null and void.

*By the Court*, INGRAHAM, J. The objection taken to these proceedings, on the ground that the act is unconstitutional, cannot be sustained. The power, it is alleged, to make the application, which by the act is vested in the Commissioners of the Central Park, should have been given to the common council, and the objectors claim the act on that account to be unconstitutional. The common council never had authority, since 1807, to lay out any streets or public places in that part of the city which was

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embraced in the map of the commissioners, filed under the act of 1807. Their power was below the limits embraced in that map, and the authority conferred upon the commissioners did not in any way interfere with the authority previously bestowed on the common council. The act of 1813, expressly limited their powers to that part of the city not laid out by virtue of the act of 1807. They had no authority to lay out or open any but such as were provided for on the said map. The authority conferred on the commissioners is not that of any local officers, nor does it authorize them to discharge the duties of any office, but it provides for a discharge of a mere ministerial act, viz: presenting to the court a petition for the opening of a street. So far as the objection is taken here, we are to treat it as a mere authority for such a purpose to make an application to the court for the opening, and that power may I think be conferred on the commissioners. This objection was made to the proceedings in the *Matter of the Central Park extension*, (16 Abb. 56.) I see no reason to change the views then expressed by me against the validity of the objection.

I do not intend to be understood as holding that all the powers conferred on the commissioners by this statute are valid. The right to grade streets in this city has always been exercised by the common council, as well as other powers conferred by that act on the commissioners, and it may well be doubted whether the legislature can take from the common council this power, and confer it on state officers. It is not, however, necessary on this application to decide this point, and I make the suggestion merely to avoid the supposition that it is intended in this decision to validate all the powers granted by that statute.

The legislature might have laid out this drive in the act, and having that power they might authorize others to do it. In fact no such road or drive could be laid out without the authority of the legislature, and whenever it

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has been necessary to open any new street or avenue not laid down on the map, such legislation has been deemed necessary, and the limits of the street or avenue have been fixed by the statutes. There are several cases where such acts have been passed without any action of the common council, such as Madison avenue, part of Second avenue, and others, where proceeding have been taken by other parties than the common council. The limitation of four months, within which the commissioners are required to complete their report, contained in the act of 1862, does not apply to this proceeding. It applies to streets and avenues in the city, north of Fourteenth street, and must be confined to streets and avenues then laid out as such, and is not to be applied to such a work as that contemplated by this statute. It is evidently impracticable properly to complete such a work within that limitation.

Objections are made in several cases to the amounts allowed by the commissioners for the property taken—and the court is asked to review the decisions of the commissioners in this respect. It has been long since settled, and has uniformly been acted upon by this court, that a mere error of judgment in the valuation of property taken was not the subject of review on a motion to confirm the report, unless the sum allowed was grossly inadequate and unequal as compared with other valuations, or unless some wrong principle was adopted as to the amount allowed. There are good reasons why such a rule should be enforced. The commissioners have the opportunity of examining the property, of seeing its location and condition, its adaptation to use, and of inquiry as to value not in the power of the court, and the result of such examinations and inquiries cannot be brought before the court. There may have been difference of opinion between the owners and the commissioners as to these values, but we see nothing in this difference justifying us to interfere. There is no error in law in any mode of valuation

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which has been adopted, and we see no ground on which, according to all former decisions, we could interfere with the valuations as made by the commissioners, in the case of any of the parties objecting.

The remaining objection is to the taking of gores outside of the line of the road, as laid out, if the same is to be of one continuous width. The statute describes it as a road or public drive, running from the northerly portion of the Sixth or Seventh avenue, &c. and to enter the Central Park at or near the junction of the Bloomingdale road, Eighth avenue and Fifty-ninth street, and to follow the course of the Bloomingdale road below One Hundred and Sixth street; when the commissioners should deem such course advantageous. It then provides that they shall determine the location, *width*, courses, windings, &c. of said road.

It is very clear that this act does not authorize the taking of any land not required for the drive or road, and the latter provision seems to prescribe an uniform width to the road very inconsistent with the lines as adopted on the map filed. The act of 1839, (*p.* 182,) directs how the commissioners shall be appointed, viz. by a notice specifying the time and place of the application and the nature and extent of the intended improvement. This provision is made necessary by the act of 1865, in regard to this proceeding.

Under this provision I think it is necessary that the whole extent of the intended opening should be stated in the notice. The owners are to be informed by it what property is to be taken. A reference to a map on file in some public office is not a compliance with the statute.

It is said that the owners have in some cases appeared before the commissioners and claimed allowances for their lands, and therefore cannot now object. But that cannot give jurisdiction if it is not acquired in the mode prescribed by law. Suppose they had proceeded in addition

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to the road, to take land for a square outside of the drive and the owners had submitted their claims, it could not be upheld that the commissioners thereby acquired jurisdiction to take the same. They must be confined to the land which the notice describes as required for the improvement.

Considering the intent of the statute to make a road of an uniform width, and the notice as given of such a road, without referring to the gores outside of the road, I do not see the necessary authority for taking land outside of the lines of the road as laid out by them. But this is not all. The notice not only does not include those gores, but virtually excludes them, by the following: "said road or public drive is of a general width of one hundred and fifty-feet, as shown on a certain map," &c. Parties owning lands outside of the road so described, could not be notified that it was intended to go outside of those lines and take large parcels of land at different places on the route. The commissioners had no jurisdiction to take these gores, and so far as they are included in these proceedings, they are erroneously taken.

The report should be sent back to the commissioners, with directions to omit the valuation of the land outside of the road as described in the notice; to deduct the amount awarded therefor from their assessment, in such manner as they shall deem just; and to assess the same for benefit, if such lands are benefited by the improvement.

[NEW YORK GENERAL TERM, JUNE 1, 1868. *Geo. G. Barnard, Ingraham and Sutherland, Justices.*

SAMUEL FREEMAN vs. JULIA ANN FREEMAN and JAMES W.  
FREEMAN.

Where the plaintiff, being the owner of land, gave the same, by parol, to the defendants, and the use thereof, so long as they, or either of them, should live, and the defendants went into possession of the land, and occupied it, made improvements and paid a portion of the taxes thereon; *Held*, that this was a gift so far executed as to entitle the donees to a specific performance of it by the donor.

*Held, also*, that the acceptance of the land by the defendants as a gift, and their occupancy of it and their improvements upon it, pursuant to the gift, with the approbation of the donor, rendered the gift irrevocable; it being executed by the parties, except that no deed was delivered.

*Held, further*, that the gift partook of the nature of a contract, and became binding upon the donor as a contract, by a good and valuable consideration moving from the donees; by their changing their place of residence, and spending several years upon the land when it yielded but very little; and by their making valuable improvements on the land, and paying taxes thereon.

That the donees were, in equity, entitled to a life estate in the premises, and that it would be against conscience to allow the donor to revoke the gift; and that it should be specifically enforced, by a decree directing the execution of a deed by the donor, conveying the premises to the donees, to have and to hold the same so long as they or either of them should live.

THIS action was brought to recover the possession of about forty-five acres of land situated in the town of Taylor, in the county of Cortland. It was tried before a referee, upon whose decision judgment was entered and docketed in Cortland county, in favor of the plaintiff. The defendant Julia Ann Freeman, who alone defended the action, appealed from the judgment to the general term.

*Waters & Waters*, for the plaintiff.

*Miner & Kern*, for the defendants.

*By the Court*, BALCOM, P. J. The conclusions of fact, found by the referee, are as favorable to the defendant Julia Ann Freeman, as are necessary to present the question as to the correctness of his conclusions of law, that

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the plaintiff was entitled to recover the possession of the land in dispute, notwithstanding the facts. The answer, so far as the facts are concerned, is substantially sustained by the conclusions of fact found by the referee.

The plaintiff purchased the land and paid \$700 therefor, on the 7th day of February, 1860. He immediately wrote to the defendants, who were then residing in the town of Smithville, in the county of Chenango, as follows:

"February, 1860, James and Julia Freeman; I have just succeeded in buying a small place for you. There is a small but comfortable log house and barn on it. You can get a good living on it after a few years. It is for you and yours as long as you live, or as long as you have a mind to stay on it. It is about half mile from school. I shall be down with teams to move you on to it as soon as the going will permit. SAMUEL FREEMAN."

Before the end of February, 1860, the defendants and their children, in pursuance of a parol gift of the land by the plaintiff to the defendants, went into possession of the land and occupied the same to the time of the trial of this action in March, 1867.

When the defendants took possession of the land, only about three acres of it had been cleared. They cleared about twelve or fifteen acres more of the land and fenced the same, and they also built an addition to the house on the land, being assisted more or less each year by the plaintiff, who resided not a great way off. The defendants paid a portion of the taxes on the land during their occupancy of the same.

The evidence, aside from the plaintiff's letter, clearly sustains the conclusion of the referee that the plaintiff gave by parol the land to the defendants, and the use thereof so long as they or either of them should live.

The plaintiff is the father of the defendant, James W. Freeman. For some cause, not explained by the evidence,

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James W. Freeman left his wife and the land, and went to live with the plaintiff, his father, the last of April, 1866, and did not thereafter return to the land, or live with his wife, the defendant Julia Ann Freeman.

James W. Freeman has not defended the action; and it is probable (though there is no finding of the referee on the question,) he connived with the plaintiff to turn his wife and children, who remained on the land, out of the possession thereof. But as the gift of the land was to the defendants, husband and wife, jointly, James W. Freeman, the husband, could not do any act that would deprive his wife of her rights, if she has any, by reason of the gift and what she and her husband did upon the land.

The plaintiff sent his team after the defendants when they moved from Smithville upon the land in question, on the 16th day of February, 1860.

It is fair to infer from the evidence that all the plaintiff did upon the land after the defendants went into possession of the same, was prompted by the love and affection he had for the defendants and their children, and that he was actuated by the same motive when he paid portions of the taxes on the land. According to his letter to the defendants, he did not think they could get a living on the land for the first few years after they should take possession of the same. It undoubtedly was for that reason that he assisted them after they took possession of the land.

It is hardly necessary to refer to the well settled principle that, in equity, part performance takes a parol agreement for the sale of real estate out of the operation of the statute of frauds. (*See Malins v. Brown*, 4 Comst. 403.) According to our statutes, nothing in them "shall be construed to abridge the powers of courts of equity, to compel the specific performance of agreements, in cases of part performance of such agreements." (2 R. S. 135, § 10.)

Whether a gift of land may be so far executed as to enti-



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the donee to a specific performance of it by the donor, is the question to be determined in this case.

In the case of *the Lessee of Syler and wife v. Eckhart*, (1 Binney, 378.) Tilghman, Ch. J. in delivering the opinion of the court says: "It has been settled that where a parol agreement is clearly proved, in consequence of which one of the parties has taken possession and made valuable improvements, such agreement shall be carried into effect. We see no material difference between a sale and a gift; because it certainly would be fraudulent conduct in a parent to make a gift which he knew to be void, and thus entice his child into a great expenditure of money and labor, of which he meant to reap the benefit himself." And it was held in that case, that a parol gift of lands by a father to his son, accompanied with possession, and followed by the son making improvements on the land, is valid, notwithstanding the act of frauds and perjuries.

Judge Black charged the jury in *Hugus v. Walker*, (12 Penn. R. 173,) as follows, to wit: "Where a man makes a parol sale and receives the purchase money, he cannot set up the statute of frauds against the validity of the contract. So, where he makes a gift by parol, either to his son or to a stranger, if the donee has gone into possession in pursuance of the gift, and made valuable improvements on it, the land so given cannot be claimed back again, and the possession resumed by the donor." The judgment in that case was affirmed. And Coulter J. in delivering the opinion of the court, said, in respect to the charge of Judge Black to the jury: "I will let the charge speak for itself. It will carry itself through."

The principles laid down in the above two cases, have never been departed from by the courts of Pennsylvania, but have been sustained and reiterated in other cases. (See *Mahon v. Baker*, 2 Casey, 519.)

The following cases sustain, to some extent, the proposition that the acceptance of the land in dispute, as a gift,

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by the defendants, and their occupancy of it, and their improvements on it pursuant to the gift, with the approbation of the plaintiff, render the gift irrevocable: *King's heirs v. Thompson*, (9 *Peters*, 205;) *Pope v. Henry*, (24 *Verm. R.* 560;) *Dugan v. Gittings*, (3 *Gill*, 138.)

The gift was executed by the parties, except that no deed was executed by the plaintiff and delivered to the defendants, so as to show that the defendants had a freehold estate in the land.

I am of the opinion we ought to hold that the gift partook of the nature of a contract, and became binding upon the plaintiff in the nature of a contract, by a good and valuable consideration, that moved from the defendants, by their changing their place of residence, and spending six years of their lives upon the land, when it yielded very little, and by their making valuable improvements on the land and paying taxes thereon. It is not improbable that the defendants, within the time they occupied the land in dispute, might, if they had lived elsewhere, have earned and saved property of greater value than this land. Had the defendant James W. Freeman remained on the land with his wife, it would have been unjust and tantamount to a fraud, for the plaintiff to have turned the defendants out of possession. And is it not more unjust and more like fraud for the plaintiff, with the consent, if not connivance, of James W. Freeman, to turn the wife of the latter out of possession of the land?

It seems to me the conduct of the plaintiff towards the defendant, Julia Ann Freeman, should be characterized as fraudulent, and be held fraudulent.

The gift of the land to the defendants was a direct encouragement to them to spend their lives upon it, labor on it, improve it and to expend money upon it, and it would be against conscience to allow the plaintiff to revoke the gift. And I am of the opinion the gift should be specifically enforced on the ground that it has become irrevocable.

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cable, and valid as a contract, by reason of the consideration that has moved from the defendants in consequence of the gift; which consideration they could not recover of the plaintiff, if its value could be ascertained or estimated in dollars. (*See Rhodes v. Rhodes*, 3 Sandf. Ch. 279.)

The case is one in which justice cannot be done without holding the gift of the land to the defendants irrevocable and enforcing it in favor of the defendant, Julia Ann Freeman.

The plaintiff's counsel relies on the case of *McCray v. McCray*, (30 Barb. 633,) to sustain the decision of the referee. In that case a new trial was granted on the ground that the defendant had offered to prove a parol contract for the land in dispute, and part performance of it, which was improperly rejected. The question whether the defendant could have held the land in dispute, in that case, by a parol gift, was not decided; and it was not necessary to determine that question, for there was a contract that controlled the decision.

I am aware that the general rule is, that a gift, strictly speaking, is not regarded in the light of a contract, because it is voluntary, and without consideration. And yet every gift which is made perfect by delivery, is an executed contract; for it is founded on the mutual consent of the parties, in reference to a right or interest passing between them. (*See 2 Kent's Com. 9th ed. p. 574.*) It is no innovation to hold that the gift of the land in this case, partook of the nature of a contract and became binding upon the plaintiff as a contract, when the consideration, in consequence of the gift, passed from the defendants. And it was not necessary that the plaintiff should be benefited by the consideration. It must be deemed to have passed from the defendants at the instance and request of the plaintiff. He solicited them to take the land, and move on to it, occupy it and improve it, at a loss to them, for they could not get a living on it. He assisted them in

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moving upon it. And although he was prompted to do so by the love and affection he had for the defendants, he must be held responsible for the situation in which the defendants were at the time he undertook to turn them out of the possession of the land.

My conclusion is that the defendants were, in equity, entitled to a life estate in the land in dispute at the time the action was commenced; and that the referee should have found, as a conclusion of law, that the defendant, Julia Ann Freeman, was entitled to a judgment in her favor, and entitled to a deed conveying to her and her husband the land in dispute, to have and to hold the same so long as they or either of them should live. (*See Lobdell v. Lobdell*, 33 *How. Pr.* 347.)

If these conclusions are correct, the judgment in the action should be reversed, and a new trial granted, costs to abide the event.

So decided.

[BROOME GENERAL TERM, July 21, 1868. *Balcom, Boardman, Parker and Murray*, Justices.]

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In the matter of the application of THOMAS SWEET vs. JOHN C. HULBERT, county judge, &c.

A writ of prohibition issues, to forbid a court and party to whom it is directed, from proceeding in any matter designated, then pending before it. It will lie to prevent the exercise of unauthorized power by an inferior tribunal, in cases where it has jurisdiction, as well as where it has not jurisdiction.

The writ does not issue, of course; it is always in the discretion of the court, and should not issue where the party has a complete and adequate remedy at law.

Under a statute authorizing a certain town to issue bonds, to aid in the construction of a railroad, which provides that on the application in writing of twelve or more freeholders, it shall be the duty of the county judge to appoint, under his hand and seal, three freeholders, residents of the town, to

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be commissioners of such town, to carry into effect the purposes of the act, the action of the county judge, on such application, is *judicial*. It is conferred by the statute upon the office of county judge, to be exercised under its seal. The duty requires the exercise of judgment and discretion in the selection of commissioners; and in no sense is the act of selecting them *ministerial*.

If the act under which such application to the county judge is made is unconstitutional, or otherwise unauthorized, that officer should not be permitted to proceed under it.

The legislature of this state has no power to confer upon towns authority, absolute or conditional, to issue bonds and *donate* the proceeds to a private corporation.

Though it were conceded that the legislature has the power to *enable* towns to subscribe for stock in a railroad corporation and issue bonds to pay for the same, it would not follow that it might pass laws enabling towns to issue bonds and *donate* the proceeds, or if it did pass such laws, that any bonds issued or other act done under that authority would be valid against the town. *Per JAMES, J.*

The act of the legislature of this state entitled "An act to authorize the town of Saratoga, in the county of Saratoga, to issue bonds to aid in the construction of a railroad from the village of Mechanicsville to intersect the Glens Falls Railroad," passed April 27, 1868, (*Laws of 1868, ch. 884*.) is unconstitutional and void.

That act does not assume to take the money of the tax payers by due process of law, nor in virtue of the right of eminent domain; and it does not come within the legitimate scope and purpose of the taxing power of the government. It, therefore, follows that in passing said act, the legislature exceeded its powers; that the act was unauthorized; and is without validity or force. The property of the citizen cannot be taken from him without his consent, except by due process of law, or by eminent domain, or by taxation. Against every other mode he is protected.

**T**HIS is an application for the allowance of a writ of prohibition. The applicant is a resident and tax payer of the town of Saratoga, Saratoga county; and John C. Hulbert is county judge of said county.

On the 27th of April, 1868, an act was passed by the legislature of this state, entitled "An act to authorize the town of Saratoga, &c. to issue bonds to aid in the construction of a railroad from Mechanicsville to intersect the Glens Falls railroad."

Section 1 provides, that "on the application in writing

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of twelve or more freeholders, residents of the town, &c. it shall be the duty of the county judge to appoint, under his hand and seal, three freeholders, residents of said town, to be commissioners of said town, to carry into effect the purposes of this act," &c.

Section 2 authorizes "the commissioners to borrow, on the faith and credit of the town, \$100,000," on terms specified, and to execute the bonds of the town therefor.

Section 3 authorizes "the commissioners to dispose of said bonds," &c. and that the money raised therefrom "shall be *donated* to such railroad corporation or association, as has now, or shall hereafter, file articles of association," to build and operate such railroad.

Section 4, authorizes the raising of money by tax upon the taxable property of the town to pay the principal and interest of said bonds.

Section 5 declares that no bonds shall be issued until the consent in writing be first obtained of a majority of the tax payers in number and amounts appearing upon the assessment roll of 1867.

Application having been made in writing, by twelve or more freeholders of said town, to the county judge, for the appointment of commissioners under said act, and said judge being about to make such appointment, the petitioner applied for said writ, to prohibit said county judge from making such appointment, on the ground that said said act is unconstitutional and void.

*W. A. Beach* and *J. W. Crane*, for the application.

*A. Pond*, in opposition.

*By the Court*, JAMES, J. The first point raised in this case is, that a writ of prohibition is not proper.

A writ of prohibition issues, to forbid a court and party to whom it is directed, from proceeding in any matter

designated, then depending before it. It will lie to prevent the exercise of unauthorized power by an inferior tribunal, in cases where it has jurisdiction as well as where it has not jurisdiction. (*Quimbo Appo v. The People*, 20 N. Y. Rep. 550.)

The action sought from the county judge, on the application of certain freeholders, is judicial. It is conferred by the statute upon the office of county judge, to be exercised under its seal. The duty requires the exercise of judgment and discretion in the selection of commissioners. The individual is in no way responsible for any acts of those he may select, in the discharge of their duties. In no sense is the act of selecting commissioners ministerial. They do not act on the command of the county judge; he issues no process to them. If, after appointment, the persons designated accept and act, they do so under and by virtue of the statute, and not in virtue of the order designating them as commissioners.

A writ of prohibition does not issue of course; it is always in the discretion of the court, and should not issue where the party has a complete and adequate remedy at law.

If the act under which the application to the county judge is made, is unconstitutional, or otherwise unauthorized, this officer should not be permitted to proceed under it. It is better to stop action at once, even though such action would be void, than to allow proceedings to be had which would subject the actors to prosecution, and others to inconvenience and litigation. Therefore a case is presented in which it is highly proper to grant a writ of prohibition, if we come to the conclusion that the act above referred to is unconstitutional or unauthorized.

The important question on this application may be stated thus: Has the legislature of the state power to confer upon towns authority, absolute or conditional, to issue bonds and *donate* the proceeds to a private corporation?

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If the power exists, we need not, on this application, spend any time about the details. Such questions cannot arise until after action under the statute.

This act is different, in the particular of authorizing the money to be "*donated*," when raised, from that numerous brood of statutes which has preceded it, authorizing towns to bond themselves, in aid of real or imaginary public improvements. In all other acts, stock, or some pretended equivalent, is contemplated as a consideration for the bonds to be issued. But this act authorizes a donation, pure and simple; in other words, the legislature has assumed to authorize, through the instrumentality of commissioners and the taxing power, the taking of a certain amount of the property of one corporation and donating it to another. If this can be done, it is legal robbery; less respectable than highway robbery, in this, that the perpetrator of the latter assumes the danger and infamy of the act, while this act has the shield of legislative irresponsibility.

Towns are one of the political divisions of the state. They are declared by statute (1 R. S. 337, §§ 1 and 2) to be a body corporate, with capacity to sue and be sued; to purchase and hold lands; to make such contracts, and to purchase and hold such personal property, as may be necessary to the exercise of its corporate or administrative powers; and to make such orders for the disposition, regulation or use of its corporate property, as may be deemed conducive to the interests of its inhabitants; and that no town shall possess or exercise any corporate powers, except such as are enumerated or specially given by law, or are necessary to the exercise of the powers so enumerated or given.

It is thus seen that the power to issue bonds and *donate* the proceeds, is not among the general powers possessed by towns; nor was such a power contemplated in the creation of such political divisions.



It must be conceded that the Court of Appeals has held that the legislature may pass enabling acts authorizing towns to subscribe for the stock of railroads, and issue its bonds to pay for the same; but that court has not yet gone so far as to hold that a town was bound to accept such act, or that the legislature might, by legislative enactment, compel acceptance; or that the legislature might enable the town to issue its bonds and *donate* the proceeds to third parties, either natural or artificial.

If we concede to the legislature the power to *enable* towns to subscribe for stock in a railroad corporation and issue bonds to pay for the same, it would not follow that it might pass laws enabling towns to issue bonds and *donate* the proceeds; or if it did pass such laws, that any bonds issued, or other act done under that authority, would be valid against the town.

The argument in support of such legislative power, and the validity of its enactments, is, "that the legislature has the right to pass any law not specifically prohibited by the constitution; that it possesses the sovereign power of the state, and, like the British parliament, is omnipotent, where not restrained by the constitution of the state or United States." In the language of Chase, justice, in *Calder v. Bruce*, (3 *Dallas*, 386,) "I cannot subscribe to the omnipotence of a state legislature, or that it is absolute and without control, although its authority should not be expressly restrained by the fundamental law. \* \* \*

The purposes for which men enter into society will determine the nature and terms of the social compact; and, as they are the foundation of legislative power, they will decide what are the proper objects of it; and the nature and end of legislative power will limit it. There are acts which the federal and state legislatures cannot do without exceeding their authority. There are certain vital principles which will determine and overrule an apparent and flagrant abuse of legislative power; as to authorize mani-

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fest injustice by positive law; or to take away that security for personal liberty, or private property, for the protection of which governments are instituted. An act of the legislature, contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority. The obligations of a law in governments established on express compact, and on republican principles, must be determined by the nature of the power on which it is founded. A law that punishes a citizen for an innocent action, that impairs or destroys the lawful private contract of the citizen, that makes a man judge in his own case, or that takes property from A and gives it to B, is against all reason and justice; and, therefore, if there was no restriction in the constitution against such acts, it could not be presumed that the people had entrusted such power to the legislature."

The state constitution does not define the powers of the state legislature. It would be almost impossible to enumerate and define them; but, in delegating to a senate and assembly, with the approval of the governor, the power to make laws, under certain limitations and restrictions, but without enumerating and defining those powers, the people did not, nor did they intend to, invest that body with authority to make laws inconsistent with natural right. If conceded that outside of constitutional restrictions, the legislature possesses the sovereign power of the state, it is only the power the people possessed; and they did not possess the power to destroy the natural rights of a citizen, to declare innocence a crime, or, on their own volition, to take the property of one and give it to another. Inhibition against such acts was unnecessary, because they were inhibited by the higher law of natural right.

As was said by Justice Allen, in *Clark v. City of Rochester*, (13 How. Pr. 206,) "there is no provision in the constitution of the state, in terms, prohibiting the legislature

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from compelling the citizen, either individually or in communities, against their will, to become shareholders in companies formed for the construction of canals, railroads, manufacturing, commercial or other purposes; neither is such power conferred; and its assumption is adverse to the spirit of the whole instrument, and inconsistent with the just rights of the people."

Any attempt by the legislature to exercise such powers, would be as much a violation of the spirit of the constitution, as would the violation of any one of its express provisions.

But the act under consideration is contrary to the spirit of the constitution, if not a violation of its letter. That instrument declares that "no person shall be deprived of his property without due process of law." Legislative enactment is not due process of law. "Nor shall private property be taken for public use without just compensation." The use specified by this act is not a public use, but a donation to a private company; the pretense is to aid in the construction of a work which the public may use by paying for the privilege; still it is private property; beside there is no obligation imposed, or security required, that this work shall ever be completed. The act contemplates no compensation for this money. Therefore taking the property of the citizen to pay these bonds would be taking it for private, not public use, and without compensation; and none the less so because taken through the instrumentality of the taxing power, unless within the legitimate scope and meaning of the taxing power, as I think it was not.

Since the recent decisions of the Court of Appeals, it would be improper for this court to question the authority of the legislature to enact laws enabling a town to subscribe for stock in a railroad, issue its bonds, or to raise money by tax, or to pay for the same, (*Bank of Rome v. The Village of Rome*, 18 N. Y. Rep. 38,) although if it were a new

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question we should hope for a different rule. But the Court of Appeals has not yet held the legislature may enact a law that will authorize town officers, or commissioners to issue its bonds and give them away to a private or public corporation; or if it does, that such a law would be valid or binding on the town, or afford any protection to one who should seek to enforce it.

Every statute authorizing the bonding of towns to aid in the construction of railroads, &c. which has as yet been upheld by the courts, contemplated some direct equivalent, in stock or otherwise, before issuing and delivering the bonds or their proceeds. In this act no equivalent, real or imaginary, is contemplated—none certainly secured. The act directs the proceeds of the bonds to be donated; not upon the completion of the work, but upon the organization of a company or association; it does not devote the money to the construction of the railroad, through public officers devoted to the duty, but donates it to a company, and then declares it shall be employed and used in the construction of a railroad. The gift is positive, the use is directory. The company gets the money, but neither the public, nor the tax payers, nor the town, get any security that the road shall ever be completed. The only security required is that the road shall be completed and the money expended, without saying when.

The donation provided by this act is not for a public improvement, the tax is not authorized as such. To that end an appropriation should be directly to the object, and the act should direct the amount to be levied, and when. This act makes no appropriation—directs no work to be constructed—but simply authorizes the town, on certain conditions, to issue its bonds, give away the proceeds, and then tax the citizens to pay the principal and interest. To call this a legitimate exercise of the taxing power, or within the scope and meaning of such power, would be an abuse of terms.

A law may be declared invalid when it violates the latent spirit of the constitution as well as when it comes in collision with some express provision thereof. An act empowering the supervisor of a town to issue its bonds in amount equal to the value of all the real and personal estate therein and donate the same to another town, and authorizing the officers of said town to levy the amount upon the taxable property of said town, would be no more a violation of the latent spirit of the constitution than is the act under consideration, and would be as much a violation of that instrument as would a statute directing a new trial in a court of law, or declaring a man guilty of an offense, or granting a pardon after conviction.

"The property of the citizen is, to some extent, in the power and at the disposal of the government. Its use may to some extent be regulated. It may be condemned by appropriate process as injurious to the health, or morals, of the public; or, to the well being and safety of the state; it is liable to be taken for public purposes upon just compensation made; and is liable to assessment and taxation for the general purposes of the government, or for local benefits and improvements. But the citizen does not hold his property by so slight a tenure that it can be taken from him by the legislature for any and all purposes, either under the guise and power of taxation, or color or pretense of exercising any of the other recognized powers of the government. All power in the legislature over the property of the citizen, is derived from the people, and is either directly conferred by the terms of the constitution, or impliedly granted, as incidental to some power expressly given, or results from the necessities of government, and exists as an incident to government." (*Clark v. City of Rochester, supra.*) Authorizing a town, through its officers, or by commissioners, to donate its property to a private,

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or *quasi* public corporation, is not among such express or implied powers.

The property of the citizen cannot be taken from him without his consent, except by due process of law, or by eminent domain, or by taxation. Against every other mode he is protected.

The act under consideration does not assume to take the money of the tax-payers by due process of the law, nor in virtue of the right of eminent domain; and it does not come within the legitimate scope and purpose of the taxing power of the government; it therefore follows that in passing said act the legislature exceeded its powers; that the act was unauthorized; and is without validity or force.

It is to be regretted that so important a question should arise on a motion, but being presented and properly and necessarily involved, we could not escape its consideration. We therefore allow the writ.

[ST. LAWRENCE GENERAL TERM, October 6, 1868. *James, Roskrans, Potter and Becker*, Justices.]

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### FRANK LINDNER *vs.* MARIA SAHLER.

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When a married woman acts and speaks by her husband, his declarations and acts are hers, and she must see to it—particularly when he assumes to act and speak in her presence, for her—that he speaks and acts as the law and her duty require her to speak and act if she spoke herself. She must, in such case, dissent and disapprove his acts and declarations, or they should be deemed hers.

She cannot stand by and hear him assert rights for her, and in her behalf, or do wrong for her benefit, or refuse to do what her legal duty requires, and escape responsibility. Under such circumstances, if she does not dissent, she will be deemed to assent.

Thus, where the plaintiff, having lost certain sheep, went to the defendant's house, and demanded them of her husband, she being present, at the time,

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with which demand the defendant's husband refused to comply; *Held* that it was a question for the jury whether the defendant's husband refused to deliver the sheep on such demand, by her authority, direction or assent; whether he spoke for his wife, and she knew that he assumed to do so, and assented to what he said, or to his assumption to act and speak for her. And that if she did, the jury might infer a refusal by her; and in that case an action would lie, against her, for a conversion.

**A** PPEAL from a judgment of the county court of Ontario county, on appeal from a judgment rendered by a justice of the peace. The action was trover, for the conversion of fifteen sheep. The defense was a general denial. The justice rendered a judgment for the plaintiff, and the defendant appealed to the county court, where a new trial was had. The plaintiff proved his ownership of the sheep; that they were found in the defendant's possession; and that a demand thereof was made of the defendant's husband, (she being a married woman,) in her presence, with which he refused to comply. When the plaintiff rested, the defendant's counsel moved the court, that the plaintiff be nonsuited, and insisted that the defendant had done no act to render her liable in this action. That she was never notified of the plaintiff's claim to the sheep. That it was necessary for the plaintiff to have called upon her for the sheep. That an agent cannot make the principal liable for a tort. That the defendant had no control of the sheep. That the evidence was sufficient to charge her husband, but not her. The plaintiff's counsel requested the defendant's counsel to state the precise ground on which he based his motion for a nonsuit, to which he replied, upon the ground that there was no evidence that the defendant converted the property in question, and no evidence of the sheep being in the defendant's possession, or to show the plaintiff the owner of the same. The plaintiff's counsel insisted that there was sufficient evidence to require said court to submit the cause to the jury, but the court ruled and decided that there was not sufficient

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evidence of a conversion by the defendant, of the sheep in question, and nonsuited the plaintiff, to which ruling and decision the plaintiff excepted.

*Geo. F. Danforth*, for the appellant.

*E. G. Lapham*, for the respondent.

*By the Court*, E. DARWIN SMITH, J. The nonsuit in this case was, I think, erroneously granted. The plaintiff gave evidence sufficient to take the case to the jury upon every question essential to sustain the right of action, except upon the point of conversion. In the absence of any proof that she knew that the plaintiff's sheep were mingled with hers and that she had received the profits thereof, I think it quite clear that an action of trespass or trover would not lie against her for such sheep, without proof of a demand distinctly made upon her for their delivery. The case, therefore, turns upon the question whether the demand made of her husband was sufficient to sustain the action. It seems to me that it was sufficient to take the case to the jury. The plaintiff testified that after finding the sheep on the defendant's premises, he went to the defendant's house and there saw the defendant's husband, and that the defendant was standing by while they were talking with him. He says: "Mr. Sahler asked me if I saw any of my sheep there? and I told him, yes." "I told him that I wanted my sheep, and he told me that I could not have them; that I had no sheep there." The witness Redfield, who was also present at the same time, says he heard the conversation between the plaintiff and Sahler, and that the defendant also came to the door at the time during the conversation, but could not say whether she stayed long enough to hear or not; she was there but a little while. Upon this evidence I think it was a question for the jury whether the defendant's husband then and there refused



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to deliver the sheep, upon this demand, by her authority, direction or assent; whether he spoke for his wife, and she knew that he then and there assumed so to do, and assented to what he said, or to his assumption to act and speak for her. If she did, I think the jury might have inferred that she refused, then and there, to give up the sheep, and if so the action would have been sustained. When a married woman acts and speaks by her husband, his declarations and acts are hers, and she must see to it, particularly when he assumes to act and speak in her presence for her, that he speaks and acts as the law and her duty would require her to speak and act if she spoke herself. She must in such case dissent and disapprove his acts and declarations or they should be deemed hers. She cannot stand by and hear him assert rights for her and in her behalf, or do wrong for her benefit, or refuse to do what her legal duty requires, and escape responsibility. She must be deemed to assent when she does not dissent, under such circumstances. At least in this case I think the question should have gone to the jury, upon the facts, to say whether she heard what was said at the time, understood what was the subject of the conversation, and what was the claim of the plaintiff; and whether with such knowledge she allowed her husband to refuse to comply with the demand then made for the delivery of the sheep in question. Upon this ground I think the judgment should be reversed and a new trial granted, to be had in the county court, with costs to abide the event.

[MONROE GENERAL TERM, September 7, 1868. *E. D. Smith, Johnson and J. C. Smith, Justices.*]

VAN ALSTINE *vs.* McCARTY.

A disseisee of land cannot maintain an action against the disseisor, or any one acting under him, for an injury to the premises while he is out of possession ; but after a re-entry he can recover for any such injury, and for the rents and profits.

Where an action of ejectment is brought against one in possession as tenant of another, and the defendant gives notice of the suit to such other person, as required by statute, the latter, in the absence of any proof to the contrary, will be deemed to have assumed the defense of the action, and will be concluded by a recovery therein against the defendant.

Although the statute declares a recovery in ejectment shall be "conclusive against the defendant and all persons claiming through or under such party by title occurring after the commencement of the action," yet a person having notice of the action, and having assumed its defense, will be deemed the real party in the suit, within the spirit and intent of the statute ; or if not, he will be bound by the recovery, on the ground that he had notice of the suit and was called upon to defend.

Hence an action will lie against such person for the mesne profits, without any recovery in an action of ejectment brought against *him*.

If he is not concluded by the judgment in the ejectment suit, on the ground that he was the real party defending the action, and bound by the recovery therein, he will be liable for the rents and profits, at common law, after the plaintiff has recovered possession, where it appears that he has actually received such rents and profits.

**T**HIS action was brought to recover damages for an unlawful entry upon, and use of certain premises claimed by the plaintiff, from about the year 1859 to the year 1866. The evidence showed title in the plaintiff, and occupancy of the premises by the defendant. The plaintiff, in August, 1865, brought ejectment against one Michael Brosnan, a tenant of the present defendant ; Brosnan gave notice of such suit to the present defendant ; and on the 15th of January, 1866, the plaintiff recovered a judgment in that action for the possession of the premises ; and before the commencement of this action he re-entered upon the premises, in pursuance of said judgment, and regained the possession thereof.

An answer was put in, in the ejectment suit, in the name of Brosnan ; but Brosnan swore, on the trial, that

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he did not employ any attorney to defend the suit, and did not know what McCarty did towards defending it; that McCarty did not ask him (Brosnan) to let him defend in Brosnan's name, either then or at any time since; that he (Brosnan) never put in an answer, in the suit, and never authorized any person to put in an answer for him.

On the trial of this action it was admitted by the counsel for the defendant, that the defendant had been in possession of said premises for seven or eight years previous to March, 1866, claiming title, and that if the plaintiff was entitled to recover, he was entitled to recover the amount claimed in the complaint. It was also admitted that Brosnan had removed from the premises before the termination of the ejectment suit, and that one Titus Allen was in possession at the time, as the tenant of the defendant McCarty, and that after the termination of the ejectment suit against Brosnan, Allen attorned to Van Alstine, (the present plaintiff,) and agreed to pay rent to him, and that in the month of March, 1866, for non-payment of rent, the plaintiff, by summary proceedings with a landlord's warrant, turned Allen out and took possession of the premises. It was also admitted that this action against McCarty, was commenced July 3, 1866.

From the testimony and the proceedings on the part of the plaintiff, the defendant's counsel moved for a nonsuit, on the ground that a plaintiff cannot recover in an action for mesne profits until he has settled by action the title to the premises in question, or until he has had a recovery in ejectment against the defendant. That the plaintiff has not recovered the possession of the premises as against the defendant; and that the conveyance by Rouse to the plaintiff was by statute absolutely null and void.

The court granted the nonsuit, to which decision the plaintiff's counsel excepted.

Upon a case and the exceptions the plaintiff moved for a new trial.

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*D. Baldwin*, for the plaintiff. I. The plaintiff recovered judgment against Brosnan upon the evidence contained in this case, for the recovery of the premises in question, in January, 1866, and in consequence of that judgment, Allen who had become the tenant of McCarty of these premises, by Brosnan moving out (and Allen moving in,) attorned to the plaintiff, and Allen was turned out of possession in March, 1866, by the plaintiff, with a landlord's warrant, for non-payment of rent, and in July, 1866, this action was commenced for the mesne profits.

II. The lowest degree of title to land is the naked possession. (2 *Black. Com.* 196.) And this is all the title McCarty had to these premises from 1859 to 1866.

III. It seems Brosnan was the tenant of McCarty, and when the action was commenced against him, it was his duty to give his landlord notice. (1 *R. S.* 748, § 21.) This was done.

IV. McCarty undertook to defend in the name of Brosnan, but failed in it.

V. If the plaintiff had obtained possession without suit, he would have had a right of action against McCarty for mesne profits for the time that McCarty had the unlawful use of the premises. (See *Leland v. Tousey*, 6 *Hill*, 328.) The law upon this point is laid down in the Supreme Court of the United States thus: Whoever takes and holds possession of land to which another has a better title, is liable to the true owner for all the rents and profits which he has received. (8 *Wheat.* 75, 80. 11 *Mass. Rep.* 519. *Stuyvesant v. Tompkins*, 9 *John.* 61. *Wickham v. Freeman*, 12 *id.* 183.)

VI. The evidence that McCarty occupied the premises unlawfully is that the title of the plaintiff and his grantor is clearly established from 1854 to the time of the commencement of this action, embracing the time that McCarty occupied, and it is not to be assumed, without proof, that McCarty had any right there.

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VII. The mode of proceeding for mesne profits by a suggestion upon the record, of the recovery in ejectment, is understood to be abolished by the Code, section 455. (19 *N. Y. Rep.* 488.) But this statutory method was restricted to cases where the claim was against the defendant in the ejectment suit. (*Leland v. Tousey*, 6 *Hill*, 328.)

VIII. The *principles* of the Revised Statutes are not superseded, and it is provided by statute, (2 *R. S.* 310, § 39,) that the defendant in an action for mesne profits may give in evidence any matters in bar of such claim, except such as were or might have been controverted in the action of ejectment.

IX. There seems to be a rule laid down that in an action for mesne profits, no defense of title or other matter can be set up that would have been a bar to the action of ejectment. (3 *John.* 481. 11 *id.* 461. *Id.* 405. 12 *id.* 183.) These authorities are, however, to have the qualification that in an action of ejectment against a tenant, where the landlord has had no notice of the ejectment suit, the landlord in a suit against him for mesne profits will be at liberty to set up a defense of title. (2 *Greenl. Ev.* 333, 334, &c.)

X. If McCarty had no proper notice of the ejectment suit, he could then controvert the title of the plaintiff in a suit against him for mesne profits. The provision of the statute that the tenant give notice to his landlord, and the provision that the defendant cannot give in evidence on the trial for mesne profits, any matter in bar that might have been controverted in the action of ejectment, is, for the purpose of avoiding unnecessary litigation; and these provisions of the statute are in accordance with the settled principles of law herein referred to below.

XI. If the suit for mesne profits is against the landlord and the ejectment suit was against the tenant of the landlord, the judgment against the tenant is no evidence against the landlord of the plaintiff's title, unless the landlord had notice of the ejectment suit. (2 *Greenl. Ev.* 333, 334 and

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335, and authorities there cited. *Hunter v. Britts*, 3 *Campb.* 455.) Also *Phillips on Ev. with Cowen & Hill's Notes*, 5th *American Ed.* vol. 3, p. 624, in which the case of *Hunter v. Britts* is fully set forth as contained in 3 *Campb.* 455, showing Lord Ellenborough's opinion.

XII. This case may be divided into two branches. The first may be considered as embraced in the theory laid down in *Ainslie v. The Mayor, &c. of N. Y.*, (1 *Barb.* 177,) where the requisite proof to maintain an action like that is perhaps correctly stated by the court. On page 178 in that case, the counsel for the plaintiff over estimated the importance of giving the judgment in evidence, and the court may have overlooked the fact that the judgment might have the effect to give possession of the premises to the plaintiff, as against the landlord. But in that case the plaintiff failed to prove he ever had any title or that the landlord had notice of, ejectment suit, or that the plaintiff had regained possession. A failure in proof of any one of the requisites named was considered fatal. (*See 1 Greenl. on Ev.* 523; 1 *Seld.* 558.)

XIII. In the present case all the requisites to maintain the action, named by the court in that case, are fully proved.

XIV. On the subject of the conveyance from Rouse to the plaintiff being void, the statute provides that a grant shall be void when the premises are in the possession of a person claiming under a title adverse to that of the grantor. (1 *R. S.* 739, § 160.) But the Code, even in such a case, (§ 111,) carefully provides that an action may be maintained by the grantee of land in the name of the grantor. In this case the defendant McCarty was the grantee of Corning, and the grantee of Rouse, and held under no other title than a naked possession obtained as a trespasser four or five years after he conveyed the premises. If there was any evidence that McCarty remained in possession after conveyance for the whole twelve years, he might be con-

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sidered as the tenant of his grantee, and if there was a notorious disclaimer of the grantee's title, there might be some sense in a claim of adverse possession. (1 *Wend.* 341. 21 *id.* 36.) To constitute an adverse possession the claim must be under some specific title. (*Grady v. Goodman*, 22 *N. Y. Rep.* 170.) If this case is to be governed by the principles laid down by the court in 1 *Barb.* above referred to, without regard to the notice by Brosnan to McCarty of the ejectment suit, the nonsuit will be set aside and a new trial ordered; but if the principles of law referred to in the 10th and 11th points, and the notice given by Brosnan to McCarty of the ejectment suit, are worthy of attention, the court will order judgment for the plaintiff for the amount claimed in the complaint.

*John T. Pingree*, for the defendant. I. Can the plaintiff recover, in an action for mesne profits, before he has had a recovery in ejectment *against the defendant*, or until he has settled by action the title to the premises in question *against the defendant*? In this case, there was no pretense that the plaintiff had ever recovered in ejectment against the defendant, or the title ever been litigated between them. It is submitted that the case of *Morgan v. Varick*, (8 *Wend.* 587,) is decisive of this question. The court says: "The action for mesne profits is consequent upon a recovery in an action of ejectment. A plaintiff has no right to this action until after judgment in the ejectment suit." The plaintiff claimed that he had recovered in ejectment against one Michael Brosnan, and had proven that Brosnan was, at the time the ejectment suit was commenced against him, the tenant of McCarty, the defendant in this action, and, therefore, the record was conclusive evidence of the plaintiff's title and possession against the defendant McCarty. In this the plaintiff was in error. The *Laws of 1862*, (*ch.* 485, *p.* 977,) declare, that such record shall be conclusive as to the title established in

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such action, upon the party against whom the same is rendered; and against all persons claiming from, through or under such party, *by title accruing after the commencement of such action*. The defendant, McCarty, did not claim, under the defendant, Brosnan, in the action of ejectment, and consequently the record in that action of ejectment was *no* evidence against McCarty, of the plaintiff's title or possession. Nor does the fact that Brosnan was the tenant of McCarty, at the time of the commencement of the ejectment suit, change the force of the act of 1862. The evidence shows, he was not the tenant of McCarty when the judgment in ejectment was obtained. It is submitted that an action for mesne profits cannot be maintained until the title has been put at rest between the parties. In this case, it has never been settled.

II. The plaintiff showed no title to the premises. His pretended title was void. The evidence showed, that at the time of the conveyance to him, the defendant was in possession, claiming title. (*See 1 R. S. Edm. ed. p. 690, § 147.*) It also showed that the defendant had been in possession, seven or eight years. In fact, the plaintiff had never been in possession, and his grantor had never been in possession, nor had the plaintiff's grantor ever received any rents, but the defendant was in possession adversely. (*See 2 R. S. Edm. ed. p. 713, § 6.*)

III. There was no evidence that the plaintiff had legally regained possession of the premises. He did not produce, nor did he offer to prove that any writ of possession had ever been issued on the judgment, or the defendant, McCarty or Brosnan, had been turned out, or he, the plaintiff, put into possession under that judgment.

*By the Court*, E. DARWIN SMITH, P. J. A dissesee of land cannot maintain an action against the dissiesor, or any one acting under him, for an injury to the premises while he is out of possession, but after, a re-entry he can



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recover for any such injury and for the rents and profits. (9 *John.* 61. 12 *id.* 183. 6 *Bacon's Ab.* 566. *Hotchkiss v. Auburn and Rochester Railroad Company*, 36 *Barb.* 613.) The plaintiff brought ejectment against Brosnan, a tenant of the defendant, and recovered. The tenant gave notice to the defendant of the commencement of the suit against him, as required by the statute in such case, and the defendant must be deemed, under the evidence in the case, to have assumed the defense of the action. In this view of the evidence and of the facts, the recovery in the ejectment suit was conclusive against him. It is true that the statute declares the recovery in ejectment to be "conclusive against the defendant and all persons claiming through or under such party by title occurring after the commencement of the action." But the defendant having notice of the action, and having assumed its defense, must, I think, be deemed the real party in the suit, within the spirit and intent of the statute, or if not he is to be bound by the recovery on the ground that he had notice of the suit and was called on to defend. (*Adams on Ejectment*, 337. *Hunter v. Britts*, 3 *Camp.* 445. 2 *Greenleaf on Evidence*, §§ 333, 334.) It follows from these principles that the action was properly brought for the mesne profits against the defendant, and was sustainable. He received the rents pending the ejectment suit from Brosnan, his tenant, and it was admitted that the amount so received by him was \$308. The action for such mesne profits as a substitute for the suggestion upon the record given by the Revised Statutes, (2 *R. S.* 310; 19 *N. Y. Rep.* 88;) lay against him, I think, on the ground that he was the real party defending the action and was bound by the recovery therein. But if he was not concluded on this ground, he was then clearly liable for such rents and profits at common law after the plaintiff recovered possession, on the ground that he had actually received such rents and profits. (*Morgan v. Varick*, 8 *Wend.* 587. *Leland v. Tousey*, 6 *Hill*, 328. 8 *Wheaton*, 80. 11 *Mass.*

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*Rep.* 569.) The plaintiff showed title, at the circuit, and produced the records and proceedings in the ejectment suit, and proved that he had been restored to the possession. The defendant, if not concluded by the recovery in such suit, was at liberty to defend the action and disprove the plaintiff's title. This he did not attempt to do, and in fact he made no defense. I cannot see, therefore, why the plaintiff was not entitled to a verdict, and think there should be a new trial, with costs to abide the event.

New trial granted.

[MONROE GENERAL TERM, September 7, 1868. *E. D. Smith, Johnson and J. C. Smith, Justices.*]

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ELIZA E. TOWNSEND *vs.* STEPHEN T. HAYT.

By a judgment in partition, lot No. 2 of the premises partitioned was set off and assigned to the plaintiff by its number, and by metes and bounds, by which it was bounded south by lot No. 8, which was assigned to McB. under whom the defendant claimed. These lots were both designated on a map or allotment of great lot No. 9, known as the third allotment. In such judgment reference was had to this map and allotment, but the judgment did not assume to divide any of the lots, or to change the original lines thereof, the measurements and descriptions therein being simply designed to give the boundaries of the lots according to the original lines of such lots upon the said third allotment. The surveyor, in describing and in running the lines of lot No. 2, made a mistake in respect to the southern boundary, by which he apparently added a strip of land, the whole length of said lot, of about fourteen rods in width, to lot No. 8, and diminished the size of lot No. 2, to that extent.

- Held* 1. That the plaintiff was entitled to the whole of lot No. 2, and had title to it; and that this error of the surveyor did not affect such title.
2. That it was clearly the intention of the commissioners to assign the plaintiff, in the partition, the whole of lot No. 2, as the same was known and designated on the original map of the third allotment of great lot No. 9; and the mistake of the commissioners was a mere misdescription of the

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boundaries of said lot, and not an assignment of the particular parcel of land independent of its original lines and its true boundary.

3. That although, if possession had been taken of lot No. 3, and it had been fenced, used and occupied up to the erroneous line, and such adverse use had been acquiesced in, or such line recognized as the true line, for the period of twenty years, it would have become the legal, fixed and boundary line of division between lots No. 2 and 3, by force of the statute, yet as the erroneous line ran through wild land, with no clearing, improvement or fence on either side of it, and there was no question of adverse possession, the location of the line as made by the survey had about it none of the elements of a line located by the parties *in pais*, where rights have been acquired upon the assumption that it is the true line.
4. That it was a case of *mutual mistake*, the commissioners being the agents of both parties, and the plaintiff having done nothing to estop her from asserting her right to hold the whole of lot No. 2, to the extent of the true southern boundary.
5. That McB. and the defendant claiming under him, could not hold the strip of land belonging to lot No. 2, it being confessedly not a part of lot No. 3, and they never having been in possession of it, or exercising any rights of possession over it calling upon the plaintiff to assert her rights in respect to the disputed territory.

Accordingly *held* that an action would lie by the plaintiff against the defendant for trespass, in cutting timber upon the disputed territory. .

THIS is an action of trespass to recover damages for cutting timber on land claimed by the plaintiff, and the question in dispute is in whom is the title to the land where the timber was cut, and this depends on the location of the boundary line between lands of the plaintiff, and lands of the party giving the defendant license to cut the timber, and who for the purposes of the injury may be called the defendant. The south line of the plaintiff's being the north line of the defendant's land. The plaintiff derives title from Sarah Mulhollen through conveyances vesting the title in Samuel Erwin, a devise by his will to his five children, and a partition of the lands among the devisees, whereby that portion adjoining and north of the lands of the defendant, was allotted to the plaintiff. The deeds from the common source of title under which both plaintiff and defendant claimed bore the same date, each referred to a map on the margin of the deed which was

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identical on both deeds, and the description referred to a survey made by Samuel Colgrove in 1810, of lot No. 9 in the partition of the town of Erwin among the heirs of Arthur Erwin, and which lot No. 9 is covered by the map referred to. The plaintiff is the owner of lot No. 2, and the defendant of lot No. 3, in the subdivision among the heirs of Mulhollen.

In the partition made in 1839, 28 years before the commencement of this action, between the devisees of Samuel Erwin, the south line of the land assigned to the plaintiff is located by a visible boundary and monuments, and is the line to which the defendant claims. The record of this partition was produced by the plaintiff as the evidence of her title in severalty to the land in question. The same line is located as the south line of the plaintiff's lands by the map which was made and certified by the commissioners in partition and filed as a part of the proceedings therein. The plaintiff proved that this line was located and made by the commissioners in partition as the south line of the plaintiff's land, but alleged and attempted to prove that it was so located and made by a mistake of the commissioners, or of the surveyor, who was one of them.

The counsel for the defendant requested the court to charge the jury that the line having been located by proceedings and judgment in partition, the plaintiff could not recover damages for timber cut south of that line. And to the refusal of the court so to charge, the defendant's counsel excepted. The counsel for the defendant also requested the court to instruct the jury that the line of the plaintiff's land having been located by the proceedings and judgment in partition, the plaintiff could recover only her proportionate share of the damages for the timber cut thereon in case the jury should find the south line of the land was as claimed by the plaintiff, and to the refusal of the court so to charge, the defendant's counsel excepted.

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The jury found a verdict for the plaintiff, and the defendant having made a case and exceptions, appealed from the judgment entered thereon.

*Spencer, Thompson & Mills*, for the appellant. 1. The plaintiff having acquiesced in the line located by the proceedings and judgment in partition for twenty-eight years by permitting that location to stand, is concluded by the judgment and by acquiescence under it, from questioning the correctness of it as against the defendant. (*Baldwin v. Brown*, 16 *N. Y. Rep.* 359. *Pierson v. Mosher*, 30 *Barb.* 81. *Hunt v. Johnson*, 19 *N. Y. Rep.* 279.) 1. The record in partition notoriously fixed the location by well known boundaries and visible monuments made and placed for the purpose, and it was an act of acquiescence to permit that judgment to stand without applying to the court to open it and correct the alleged mistake. 2. An acquiescence in a line between lands adjoining, for a period sufficient to bar a title by adverse possession is sufficient to establish such line, though the lands are wild and uncultivated, and unoccupied. (*Hunt v. Johnson*, 19 *N. Y. Rep.* 279, 298. *Baldwin v. Brown*, 16 *id.* 359.) 3. The plaintiff is precluded upon principles of public policy from setting up a line in opposition to one established by record to which she is a party, and which has been acquiesced in for so long a period. (*Baldwin v. Brown*, 16 *N. Y. Rep.* 359, 364. *Pierson v. Mosher*, 30 *Barb.* 81, 84.) 4. And the acquiescence in such cases affords ground not merely for an inference of fact to go to the jury, as evidence of an original parol agreement, but for a direct legal inference as to the true boundary line. It is proof of so conclusive a nature that the party is precluded from offering any evidence to the contrary. (*Baldwin v. Brown*, 16 *N. Y. Rep.* 359, 363.)

II. The plaintiff makes title through the record in parti-

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tion which being evidence for her for that purpose cannot be impeached or contradicted by her. It is equally conclusive upon her in this a collateral action as if the defendant were a party to it. (*Candee v. Lord*, 2 Comst. 269. *McCarthy v. Marsh*, 1 Seld. 263. *White v. Merritt*, 3 id. 352. *Vanderpoel v. Van Valkenburg*, 2 id. 190. *Skinnion v. Kelley*, 18 N. Y. Rep. 355. *Whittaker v. Merrill*, 28 Barb. 526. *Jackson v. Hasbrouck*, 3 John. 331.) The line in question was fixed and located by the proceedings in partition by certain boundaries and monuments, so that there is no room for any claim that the line to which the proceedings have reference was any other than the one indicated by the marks and monuments made or referred to by the commissioners. The allotment to the plaintiff, in the partition, describes the south line as commencing at a post, running 281 rods, and terminating at a post. The map of the partition indicates the same lines and the same measurements. Sharp, the surveyor and one of the commissioners, swears that he made the line indicated on the map, and that he made the corners. Thompson, the axeman, swears that he knew nothing of a line further south. The actual measurement of the line now claimed by the plaintiff is three hundred and one rods, or twenty rods longer than that given in the record or upon the map. The certificate upon the map filed, shows that the allotment to the plaintiff was made by actual survey as represented on the map.

III. The proceedings and judgment in partition embraced all the lands held by the parties as devisees of Samuel Erwin. (*Certificate of commissioners*.) The parties other than the plaintiff must be held to have accepted the portions allotted to them in severalty, and can claim nothing more. The plaintiff, in like manner, is precluded from claiming any lands other than those allotted to her; but whether precluded by acceptance or not, they are all

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bound by the judgment in partition. (*Jackson v. Hasbrouck*, 3 *John*. 331.) 1. Inasmuch as the proceedings and judgment in partition locate the south line of the plaintiff's land by fixed and determinate boundaries and monuments, the judgment must be regarded as a judicial determination of its location, estopping the parties as between themselves from alleging error or mistake in regard to it. 2. If the parties to the partition are estopped as between themselves, one of them cannot allege error or mistake, as against a stranger, for this would destroy the equality of partition as determined by the judgment. And such is actually the case here. The plaintiff, if her claim prevails, will get, instead of the 258 acres allotted to her, 269 24-100 acres, or more than thirteen acres beyond the quantity which the deeds under which she claims purport to convey. 3. The deed from the sheriff of Steuben county to Thos. J. Magee, and describing the defendant's land as containing 214 acres, is immaterial, so far as the question raised by the exceptions is concerned. This deed calls for the N. E. and N. W. corners of the lot and a straight line between them, and distances must yield to these, when ascertained. So the quantity of land must yield to ascertained boundaries. The question raised by the exceptions is on the plaintiff's, and not on the defendant's title. 4. The remedy of the party alleging a mistake in the location of the line was to apply to the court to open the judgment and correct the mistake.

IV. If the line was located by the proceedings and judgment in partition so as to leave undivided lands on the south of it belonging to the devisees of Samuel Erwin, the plaintiff being a tenant in common of only one fifth, can recover only that proportion of the damages.

*Bradley & Kendall*, for the respondent. I. The court could not assume, or direct the jury to find, that the line marked fourteen rods north of south line of lot 2, was by

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the judgment in partition, located as the south line of the land thereby allotted to the plaintiff. 1. The judgment in partition awards to her both lots, one and two, and the south line of the latter is the south line of the land thus allotted to her by that judgment. 2. The description of the parcel, comprised of lots one and two, as given in the judgment, without regard to the numbers of the lots, makes the south line of lot 2 the south line of his land thus awarded. (a.) The location of the south line and southeast corner of the Matthew McHenry lot, lying north of lot one, was established by the evidence. And by the judgment in partition, it appears that the east line of the land thereby awarded to the plaintiff, is 112 rods in length, extending south from the southeast corner of the McHenry lot. That line is the east line of these lots one and two, and necessarily extends to the southeast corner of lot two. The judgment in partition also bounds the parcel allotted to the plaintiff, on the north by the McHenry lot. The latter is the northern boundary of lot one, the line the same bearing. To insist that the south line of the land thus allotted to the plaintiff is farther north than the south line of lot two, is to contradict the judgment. (b.) Nor does the fact that Mr. Tharp, one of the commissioners, marked the line fourteen rods north of the south line of lot 2, make that the line of the land allotted to the plaintiff. He did not, nor did the commissioners assume to locate the line. That was fixed before. His effort was to ascertain its location, and in that he was in error. This parcel had a distinct location and boundaries, and they are given. They did not attempt to divide, but awarded it to the plaintiff entire. (c.) And Mr. Tharp explains and gives the reason why he failed to find the line of the parcel thus allotted. He knew the southeast corner of the parcel was the southeast corner of lot 2, and was 112 rods south from the southeast corner of the McHenry lot. He erroneously supposing that the hemlock at the creek



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(which was the northeast corner of lot 6, in the range of lots on the east,) was the northeast corner of the McHenry lot, and the northeast corner of lot 1, ran from that the requisite distance, 112 rods. But it turned out that such point at the creek was fourteen rods north of the proper corner, and included land with which the commissioners had nothing to do, while the true corner, which Tharp failed to find, was a large hemlock on the hill, fourteen rods south from that at the creek. (d.) The map drawn by Tharp was the product of this error. This map contradicted the judgment, if it is treated as making the hemlock at the creek a corner. The judgment makes the southeast corner of the McHenry lot the corner. The map makes the length of the east line correct. But on the assumption that it runs from the corner at the creek, it includes fourteen rods in width of the McHenry lot, while the judgment bounds the parcel in question by the south line of the McHenry lot. (e.) The judgment must control, and if necessary or desirable, the lines described in the map will be treated as the lines described in the judgment, although not correctly drawn in reference to adjacent lands, to which the judgment in no manner relates. The map will be deemed simply one of the lands which were the subject of the proceedings in partition, of which the McHenry lot and the lands in the range were not a part. (f.) The south line of lot 2 was the south line of the land allotted to the plaintiff as located by the commissioners. The marking, by Tharp, another line was not an act of location, but was the mere result of his failure to find the south line. It was no mistake in making location of the line, but an error in marking and representing it, growing out of a mistake as to the place of location.

II. But if it be assumed that the north one of the two lines was located by the judgment in partition as the south line of the land awarded to the plaintiff so as to leave the strip fourteen rods in width between the two lines undi-

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vided between the plaintiff and her co-tenants in common, the defendant's exceptions would not be effectual. 1. The plaintiff in that case would certainly be entitled to recover her portion of the damage. That disposes of the first exception. (*Zabriskie v. Smith*, 3 *Kern*. 336. *Abbe v. Clark*, 31 *Barb.* 238. *Van Deusen v. Young*, 29 *id.* 9.) 2. And that portion it seems would in such case be seven-twentieths, which disposes of the second exception as that request assumed one-fifth. 3. And if the evidence had established the facts assumed in the second request, so as to give force to the exception, the effect would only be to reduce the recovery had, to correspond with the interest of the plaintiff, as no such defense is alleged in answer. (*Code*, § 148. *See cases above cited.*) Such an assumption of location of line cannot, however, be supported.

III. The evidence presented merely questions of fact for the purpose of the disposition of the whole case, and they were fully submitted without any exception, and the defendant made no request for the submission of any question for the jury. 1. The question, as submitted, was for the jury to find the location of the south line of lot two, or between that and lot three. And whether the plaintiff had established her title to that line. This presented the whole case. The court assumed, as the evidence established, that lots one and two were allotted to the plaintiff. 2. The question arising upon the evidence whether the north one of the two lines was made as the south line of the land allotted to the plaintiff, or was the result of a mistake as to its location, and did not represent the south line as located, was also submitted to the jury. Thus the jury was called upon to determine whether the south line was actually located where one was marked by Tharp, or whether that line was thus marked by mistake and falsely represented the location of the south line. 3. The defendant cannot now insist that the question in reference to the marking, and location of the line should have been differ-

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ently or more specifically submitted as he made no request to that effect.

IV. The defendant did not, nor did those under whom he acted, have, or claim to have, any right to go upon any part of lot two. Their rights were confined to the lot adjoining on the south, known as lot three. And they acquired no rights on the assumption that the north one of the lines referred to, was the true line of lot three. They knew that the plaintiff claimed otherwise when they committed the trespass.

*By the Court, E. DARWIN SMITH, J.* The plaintiff being the owner of lot No. 2, and the defendant of lot No. 3, under the same title and allotment, the only question in dispute between them is simply in respect to the division line between the two lots. This question was litigated at the trial as one of fact, and the jury by their verdict have settled it in favor of the plaintiff, and affirmed her claim in respect to the true southern line of lot number two. The case having been properly submitted to the jury, and there being no exception to the charge, to disturb their verdict upon the evidence, the only question necessary for our consideration is upon the exception to the refusal of the judge to charge as requested. The counsel for the defendant requested the judge to charge the jury that the commissioners in partition having, at the time of making the partition, actually surveyed and marked the northerly line of these two lines in question, by the proceedings and judgment given in evidence in the partition between the plaintiff and others, the line in question was located as claimed by the defendant, and the plaintiff could not recover for any timber cut on the south side of that line. The defendant's exception upon the refusal of the judge to charge as requested presents the first and chief point for our consideration. This exception, I think, is not well taken. In the judgment in partition, lot No. 2 was set off and assigned to the plaintiff

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by its number and metes and bounds, by which it was bounded south by lot No. 3. These lots were both known and designated on a map or allotment of great lot No. 9, known as the third allotment. In the judgment in partition reference was had to this map and allotment. The judgment in partition did not assume to divide any of these lots, or to change the original lines of the lots, or any or either of them. It simply assigned and set off lot two to the plaintiff and then proceeded to give the boundaries of such lots by metes and bounds. The measurements and descriptions in the judgment were simply designed to give the boundaries of these lots according to the original lines of said lots upon the said third allotment. The proofs show that the surveyor, in describing and in running the lines of lot No. 2, made a mistake in respect to the southern boundary of said lot, by which he apparently added a strip of land the whole length of said lot, of about fourteen rods in width, to lot No. 3, and diminished the size of lot No. 2 to that extent. The proof clearly shows that this was a mistake of the surveyor in running out said lot No. 2, and the jury have so found. But this survey and mistake does not affect the actual rights of the parties. The plaintiff was entitled to the whole of lot No. 2. She has title to it, unquestionably, and this error of the surveyor does not affect that title. It was clearly the intention of the commissioners to assign her, in the partition, the whole of said lot No. 2, as the same was known and designated on the original map of the third allotment of said great lot No. 9. The mistake of the commissioners is a mere misdescription of the bounds of said lot, and not an assignment of the particular parcel of land independent of its original lines and its true boundary. It is doubtless true, however, if possession had been taken of lot No. 3 and it had been fenced, used and occupied up to the erroneous line, and such adverse use had been acquiesced in, or such line recognized as the true line, for the period

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of twenty years, it would have become the legal, fixed and boundary line of division between lots two and three by force of the statute. (*Baldwin v. Brown*, 16 *N. Y. Rep.* 362.) But the erroneous line ran through wild land. There was no clearing, improvement or fence on either side of it, and no question of adverse possession is in the case; and the location, if it can be so called, of said line as made by the said survey has about it none of the elements of a line located by the parties, *in pais*, where rights have been acquired upon the assumption that it is the true line, till the cutting of the timber which constituted the trespass for which this action was brought. It was a case of mutual mistake, for the commissioners were the agents of both parties, and the plaintiff has done nothing to estop her from asserting her rights to hold the whole of lot No. 2 to the extent of its true southern boundary. I do not see any ground or pretense upon which McBurney, or those claiming under him, can hold the strip of land belonging to lot No. 2, from which such timber was cut, by the defendant. It is confessedly not a part of lot No. 3. He has never been in possession of it, or exercised any rights of possession or control over it, calling upon the plaintiff to assert her rights in respect to the disputed territory, before the cutting of the timber in question.

The motion for a new trial should therefore be denied, and judgment affirmed.

Judgment affirmed.

[MONROE GENERAL TERM, September 7, 1868. *E. D. Smith, Johnson* and *J. C. Smith*, Justices.]

**THE TOWNSEND MANUFACTURING COMPANY vs. FOSTER & TOWER.**

Where a memorandum, made by a witness in his memorandum book, of what took place at an interview was made on the evening of the day on which the interview occurred, and corroborates the evidence given by the witness, on the trial, it may be received and relied upon for that purpose.

The just administration of the laws requires that where there is a decided preponderance of evidence upon one side, that should always be followed, where the witnesses on both sides are equally candid, intelligent and positive in their statements.

Where the preponderance in the evidence is so decided as to lead very naturally to the conclusion that injustice has been done to a party, by the judgment recovered against him, the judgment, under the well settled rule applicable to such cases, should be set aside, and a new trial directed.

Whenever there is good reason for believing that a referee has mistaken the import and preponderance of the evidence given on the trial, and it is evident that injustice has been done, the judgment entered upon his report should be set aside.

The rule that no evidence is admissible which does not tend to prove or disprove the issue joined, excludes all evidence of collateral facts, or those which are incapable of affecting any reasonable presumption or inference as to the principal fact or matter in dispute.

Where the issue to be tried was, whether the defendants agreed to store, insure and sell the plaintiff's goods for a commission of five per cent; *Held* that evidence offered, to prove that broker's rates of commissions at the time and place in question, were from five to seven per cent, without including either storage or insurance, was properly excluded.

**A** PPEAL by the defendants from a judgment recovered upon a referee's report.

*F. E. Cornwell*, for the appellants.

*A. P. Nichols*, for the respondent.

*By the Court*, DANIELS, P. J. The right of the plaintiff to recover in this action depended upon whether the defendants had agreed to keep the property insured, which the plaintiff consigned to them for sale. And the disposition of this question depended solely upon whether the

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relation given of the contract made between the parties, by the witness who testified to it on the part of the plaintiff, was entitled to credit, after the positive contradiction of it by the defendants' evidence. These three persons are the only surviving parties who were present when the contract was made, and the only ones who can give positive evidence of its terms. Other evidence was given tending in some degree to corroborate, as well as to discredit the evidence of the plaintiff's witness, and some tending to corroborate the evidence given by the defendants. Before the time when it was claimed on the part of the plaintiff the agreement in controversy was made, the business to which, upon its incorporation, it succeeded was carried on by Townsend & Co. And that firm had a portion of its manufactures in the hands of Durrie & Rusher, in the city of New York, for sale. This property the corporation contemplated withdrawing from that firm, and placing it in the hands of the defendants for sale by them, together with such additional portion of the manufactures of the plaintiffs as should be consigned to the city of New York for sale. For the purpose of accomplishing this result, Mr. Townsend, since deceased, with the managing director of the plaintiffs, called upon the defendants at their office in the city of New York, the last of January, 1864, and then the agreement relating to this business was entered into. On that occasion it was agreed that the defendants should receive the property of Townsend & Co. and of the plaintiffs which Durrie & Rusher then had on hand, and such other manufactured articles of the same general description as the plaintiffs should afterwards consign to them, and should sell them for the plaintiffs for a commission of five per cent. A collateral dispute arose upon the trial concerning a stipulation forming part of the agreement, that it should be reduced to writing. But it was no farther important than the incidental bearing it had upon the credit of the witnesses,

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whose evidence related to the terms of the agreement itself. The managing director of the plaintiffs testifying that it was to have been reduced to writing by the defendants, while they each as positively stated that it was to have been done by him and afterwards forwarded to them for execution. In this particular the defendants were corroborated to some extent by the witness Cavanagh, who testified that as Karr, the plaintiffs' managing agent, was leaving the defendants' store, Mr. Tower asked him to send copies of the agreement to be signed. With this exception there was no substantial disagreement upon the terms of the contract, except upon that relating to the obligation of the defendants to keep the plaintiffs' property insured. This presented the substantial controversy in the action.

Upon this subject the plaintiffs' managing director testified positively that such an agreement had been made between Mr. Townsend, acting for the plaintiffs, with the defendants; and that it was afterwards repeated over to him by the defendant Foster; and that he assented to it on behalf of the plaintiffs. This witness was corroborated, to some extent, in this statement by the memorandum which he testified he made in his memorandum book in the evening of the day on which this interview took place. Although the memorandum is begun in a tense that strictly relates to something to be done in future, yet the following portion of it quite clearly shows that it was intended to record a transaction that had at that time been accomplished. To some extent, this memorandum corroborated the evidence given by the witness, and it was properly received and relied upon for that purpose by the referee. (*Halsey v. Sinsebaugh*, 15 *N. Y. Rep.* 485, 488.) This witness had been examined on a previous hearing in this action before the same referee. And on that occasion he testified that he made the agreement with the defendants concerning the insurance and sale of this property, making no allusion to Mr. Townsend as having previously had any thing



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whatever to do with it. The explanation which the witness gave of this discrepancy was that if he did not say any thing about Mr. Townsend, it was because he was not asked. This was not a very satisfactory reason for his omission to state accurately what had transpired when the contract was made. But the discrepancy itself was not of so material a character as to produce the conclusion that it exhibited an intention on the part of the witness to deviate from the substantial truth in his relation of the interview. Though not literally, it was substantially true, because he did in reality make the agreement on the part of the plaintiffs, by accepting and assenting to the terms previously settled upon between the defendant Foster and Mr. Townsend. There is clearly nothing in this circumstance alone which could reasonably justify the conclusion that the witness intended to allow himself to deviate from what was the substantial truth of the transaction. And if he did not, he should not be discredited, because he did not select the terms he employed to express his meaning with the utmost care and accuracy. To some extent, it would tend to weaken the reliance his evidence would otherwise have produced. But how far it should be allowed to operate in this respect was more particularly a matter for the consideration of the referee in whose presence the witness was examined.

The important evidence in the case affecting the statements of this witness, is that which was given by the defendants themselves, corroborated as they were, in part, by the witness James Cavanagh. For the plaintiffs' witnesses testified that they were both present when the interview took place in which it was claimed the agreement was made, that the defendants were to keep the plaintiffs' property insured. There is no reason for supposing that the defendants did not hear, and fully understand what was said on that occasion. And they both testify clearly and positively that no agreement was made

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that they were to keep this property insured. It is true, that these defendants were giving evidence for the protection of their own interests. But in that respect they only differed from the plaintiffs' witness in the extent of that interest. For being the plaintiffs' managing director, it may reasonably be supposed that he owned a portion of the stock of the corporation, which would be enhanced or diminished in value by the result of the trial on which his evidence was given. No satisfactory reason can be gathered from the evidence as it is contained in the case submitted on this appeal, justifying the referee in rejecting the defendants' statements, of the nature of the agreement made, and relying upon that given by the plaintiffs' witness. On the contrary, the preponderance of the evidence on this subject was decidedly with the defendants. And the just administration of the laws requires that that should always be followed where the witnesses are equally candid, intelligent and positive in their statements. There is not only greater certainty secured in that manner, that the controversy will be accurately disposed of, but beyond that, it is the only practical way in which the respect and confidence of the public in the administration of the laws can be surely maintained and preserved. It is not intended to be affirmed that these principles have been intentionally disregarded in the disposition which the learned referee made of this case. But the difficulty upon this part of it is that there is nothing contained in the printed case showing their observance.

The preponderance in the evidence is so decided as to lead very naturally to the conclusion that injustice has been done to the defendants by the judgment recovered against them. And where that is the case, under the well settled authority applicable to its government, the judgment should be set aside, and a new trial directed. In the case of *Adsit v. Wilson*, (7 How. Pr. 64, 66,) it was held by this court "to be the legal duty of the courts to

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see that issues of fact in their courts, are fully and fairly tried ; and in courts of record, if the verdict or finding of the facts is so clearly without evidence, or against the evidence, as to satisfy the court that there is strong probable ground to believe that the merits have not been fully and fairly discussed, or that the jury have given their verdict under a misconception of the law, or under any improper extraneous influence, and that great injustice has been done, the court will set aside the verdict, not for the purpose of assuming the trial of the facts themselves, but for the purpose of granting a new trial by another jury, or by other triors, under circumstances more favorable to a just result." This principle is sanctioned by *Jackson v. Sternbergh*, (1 *Caines*, 162;) *Conrad v. Williams*, (6 *Hill*, 444, 451;) *Boyd v. Colt*, (20 *How. Pr.* 384;) and *Hartman v. Proudfit*, (6 *Bosw.* 191.) There is good reason for believing that the referee in this case mistook the import of the evidence given on the trial, and when that appears to have been the case, and it is evident that injustice has been done, the judgment recovered upon his report should be set aside.

Several exceptions were taken to the exclusion of evidence which was offered on the part of the defendants on the trial. There is but one of these which presents any question worthy of consideration. And that was taken to the exclusion of the evidence offered to prove that broker's rates of commissions for merely selling goods in New York, in 1864, were from five to seven per cent, without including either storage or insurance. Even if that were true, it would have no effect whatever upon the solution of the question, whether, upon the occasion in controversy, the defendants agreed to store, insure and sell the plaintiffs' goods for a commission of five per cent. Many reasons may have existed in this case, inducing the defendants to deviate from that rate. The evidence offered had no necessary tendency to prove that they did not deviate from

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it in this instance. And for that reason it was irrelevant. "The business of a trial is to ascertain the truth of the allegations put in issue," and "no evidence is admissible which does not tend to prove or disprove the issue joined." (*Starkie on Evidence*, part 3, 387. 1 *Greenleaf's Evidence*, § 51, a, § 52. 1 *Phillips' Evidence*, 3d ed. 460.) And "this rule excludes all evidence of collateral facts, or those which are incapable of affording any reasonable presumption or inference, as to the principal fact or matter in dispute." (*See also Jackson v. Smith*, 7 *Cowen*, 717.)

No legal errors were committed during the progress of the trial. But by the final disposition of the cause, as has been already shown, the learned referee mistook the import and preponderance of the evidence given upon the trial of the cause. And for that reason alone, the judgment should be reversed, and a new trial ordered, with costs to abide the event.

[ERIE GENERAL TERM, February 10, 1868. *Daniels, Marvin and Davis*, Justices.]

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THE PEOPLE, *ex rel.* Cyrus Jefferson, *vs.* EDWIN GARDNER,  
BENJAMIN BISHOP and SYLVANUS E. BRADY, assessors of  
the town of Warsaw.

A resident of this state is not liable to be assessed and taxed here, for his capital invested in loans in other states upon securities taken and held in those states, by his agents.

Whether the owner of property thus situated is liable to be assessed here, for it, depends upon the question whether it can be properly and legally held to be within this state, at the time of the assessment. As such property has no actual location or *situs* within this state, notwithstanding the owner resides here, it is not subject to taxation.

CERTIORARI to review the decision of the defendants, as assessors, determining that the relator was liable to be assessed in this state, and refusing to reduce the assessment.

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The relator is an inhabitant and resident of the town of Warsaw, in Wyoming county. And as such he was assessed by the defendants, who are the assessors of that town, as the owner of personal property to the amount of \$50,000. Of this amount, \$42,000 were assessed for personal property or securities in the hands of his agents in the states of Illinois and Wisconsin, where such securities were taken. The relator applied to the defendants to correct this assessment by deducting that amount from the assessed value of his personal property, on the ground that it was not liable to taxation under the laws of this state. For the purpose of sustaining this application he produced and filed with the defendants his own affidavit, and was examined by them under oath. The affidavit and examination proved to the defendants' satisfaction that the facts were truly stated, on which the relator's application was made. They showed that the relator, for five years and upwards prior to the time of the making of the assessment, had been engaged in loaning money on real estate securities in the states of Wisconsin and Illinois through local agents residing in those states, and selected and appointed by him for that purpose. With the exception of loans for less than \$2000 the loans were made on real estate security. They were secured by trust deeds and mortgages which were recorded under the laws of the states in which the respective securities were taken. The greater part of the moneys were loaned in the state of Illinois, and trust deeds taken in the name of the agent, for the security of the loans. The relator instructed his agents to loan his moneys only on real estate securities, and the loans made on the personal security of the borrowers were made without any direction from him that they should be so loaned. All the securities received for loans of money were retained in the hands of the agents receiving them, the relator receiving such interest as was

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paid to him, from the agents. And the moneys collected upon the securities were, from time to time, during the period through which this business had been transacted, re-loaned by the relator's agents, in the same manner as the previous loans had been made by them. About two thirds of the moneys loaned by the agents were, at the time of the assessment, the accumulations and increase derived from the loans previously made in the states of Wisconsin and Illinois. And at the time of such assessment, all of such moneys, as well as the securities taken for them, were in the said states. The assessors decided that the relator was liable to be assessed in this state, for the moneys so loaned in those states, and refused to reduce the assessment. And the certiotari in this case was issued for the purpose of reviewing the decision.

*H. S. Comstock*, for the relator.

*L. W. Thayer*, for the defendants.

DANIELS, P. J. The statute of this state relating to, and designating the subjects of, taxation, provides in general terms, that, "All lands and personal estate within this state, whether owned by individuals or by corporations, shall be liable to taxation, subject to the exceptions" afterwards "specified." (1 R. S. 5th ed. 905, § 1.) And the object of the subsequent legislation had upon the subject was not to enlarge the description thus given of taxable property, but for the purpose of more clearly specifying and describing it. When, therefore, it was afterwards, enacted that "Every person shall be assessed in the town or ward where he resides when the assessment is made, for all personal estate owned by him, including all personal estate in his possession or under his control as agent, trustee, guardian, executor or administrator, and in no case shall property so held under either of these trusts be asses-

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sed against any other person," (1 R. S. 5th ed. 908, § 5,) it was not done for the purpose of extending the principle of taxation previously adopted, but merely for the purpose of more particularly defining the manner in which the assessments should be made. And to secure that end, the persons to whom personal estate should be assessed, and the place where the assessment must be made, are very clearly and precisely declared. The question whether this section enlarged the rule prescribed by that which was first referred to was distinctly presented to the Court of Appeals for its decision in the case of *The People ex rel. Hoyt v. The Commissioners of Taxes*, (23 N. Y. Rep. 224, 230-234,) and it was there held that it did not. And that court therefore held that the circumstance upon which the liability of personal property to taxation depended was, whether or not it was at the time within this state. And if it were, then it was liable to taxation under our laws; unless it were here for sale on commission for the benefit of the owner, or consisted of moneys transmitted to agents for the simple purpose of investment, or some other similar object. Where property or moneys may be here for either of those purposes, it is expressly exempted from taxation by the section of the statute last cited.

In order to determine whether the relator was liable to be assessed and taxed for his capital invested in loans in the states of Wisconsin and Illinois, for which securities were taken and held in those states by his agents, it will be necessary to ascertain whether the property can be properly and legally held to have been in this state at the time when the assessment was made. If it were within this state at that time, then the assessment was legal and proper; if not, the assessment was illegal, and the assessors had no jurisdiction over that part of the property assessed by them. For, as has been already shown, the statute only renders such personal property liable to taxation as may be within this state.

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It is clear that the property, on account of which the assessment was made, had no actual location or *situs* within this state. For the moneys loaned, and the securities taken and held for the payment of such loans, were actually in the states of Wisconsin and Illinois. So far as they were things having a substantial existence, they were so in those states, and not elsewhere. As such they were within the sole protection of the laws of those states. The validity of the agreements under which the loans were made, the protection of the securities taken for their payment, and the remedies provided for enforcing the securities, depended alike upon such laws. In neither respect did the relator derive any benefit whatever from the laws of this state. And the consideration from which the right to impose taxes has been theoretically derived, has therefore no foundation for its support, so far as the assessment in controversy is concerned. Under that theory the government extending the security of its protection to property, is justly entitled by way of taxes upon it to its ratable equivalent of the expenses incurred for the protection afforded to it. In this instance that was not done, and could not be done, by the government of this state. But it was done by the governments of the states in which the loans were made. And the recompense for that service should justly be returned to the authorities of such states. This state has performed nothing whatever for which such recompense can be properly demanded by its authorities. But even though the assessment may have no just theory in fact to rest upon, the learned counsel, who with very great zeal and ability argued this cause on the part of the defendants, claimed that it was legal and valid, because the statute of 1851 declared that the assessment should be made for all personal estate *owned* by the person assessed. Although this language is general and broad enough to include all the personal estate of the person assessed, wheresoever it



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may be situated, the Court of Appeals, in the case already referred to, have held that it should not be so construed. But that its terms must be so far restricted as to confine them to property within this state. The fact, therefore, that the property was owned by the relator was not alone sufficient to justify the action of the assessors. To produce that result, the additional circumstance was equally essential, that the property should be within this state. Under this construction, the original section contained in the Revised Statutes, and the second section of the act of 1851, must be read together. And then, instead of providing generally that the owner shall be assessed in the town or ward where he resides, for all personal estate owned by him, that section will provide that he shall be assessed for all personal estate owned by him within this state. When thus read, this is the plain and obvious meaning of the law. (1 *R. S.* 5th ed. 905, § 1; 908, § 5.)

In order to avoid the consequences of this exposition of the statutes, the same learned counsel very earnestly urged upon the consideration of the court, that as this property consisted of what the law denominates choses in action, being obligations of an intangible nature, it was within the state, because the relator was its owner. That from its nature it must follow the person of him to whom the obligations are owing. By a legal fiction the personal estate of the owner has, for some purposes, been deemed to follow its owner. But in the adjustment of systems of taxation this fiction has been very generally rejected, on the ground that it was productive of unjust consequences. And other cases exist where, for a like reason, its application has been denied. As to visible and tangible personal property capable of having an actual *situs*, this fiction has not been allowed to prevail, so as to render such property liable to taxation when it was not within this state, even though the owner was here. (*The People v. The Commissioners of Taxes*, 23 *N. Y. Rep.* 224.) And the reasoning of the

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judge, through which that conclusion was reached, is equally applicable to the present case as it was to that, though it was not intended to be applied to a case of this description. Upon that subject Judge Comstock remarked: "This conclusion is intended to embrace only property which is visible and tangible so as to be capable of a *situs* away from the owner or his domicile; and I do not consider the question in reference to personal estate of a different description. It must be within this state, in order to be subject to taxation, for so is the statute; but that may be true of choses in action, and obligations for the payment of money due to a creditor resident here from a debtor whose domicile is in another state. If the securities are separated from the person and domicile of the owner, and are actually in the hands of an agent in another state for collection, investment and re-investment there, it may be that capital thus situated should be regarded as foreign and not domestic, in the absence of any special statutory provision intended for such a case." (*Id.* 240.) That it should be so regarded results, necessarily, on the theory of taxation previously considered, from the circumstance that the right to tax is derived from the protection afforded by the laws to the property taxed. And that theory is maintained by this decision as the true source from whence the right of taxation is legally as well as logically secured.

In the case of *Catlin v. Hull*, (21 *Verm. Rep.* 152,) this precise question was presented, under similar statutory provisions to those existing in this state. In that case the moneys were loaned on promissory notes by an agent residing in the state of Vermont, the principal residing in the city of New York, but the securities were kept in the possession of the agent. The Supreme Court of the state of Vermont held the property taxable in that state, rejecting the application of the legal fiction that the *situs* of the property followed that of the owner. This case was

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cited with approbation, and followed so far as the principle settled by it was applicable, in the disposition which was made of the case of *Hoyt v. The Commissioners of Taxes*, (23 N. Y. Rep. 238.) And when this principle was afterwards incidentally brought before the same court, Judge Davies remarked that the case of *Catlin v. Hull*, had been commented upon and approved in that court. (*The People v. Commissioners of Taxes*, 35 N. Y. Rep. 440.) In the case of *The Board of Supervisors of Tazewell Co. v. Davenport*, decided by the Supreme Court of Illinois, the question now presented did not arise. That was disposed of upon the circumstance established by the evidence, that the complainant was a resident of the county in which the tax was imposed, and for that reason was liable to taxation under the laws of that state.

The present controversy must be disposed of upon the authority of the principle sanctioned and settled by the decision made in the case of *Hoyt v. The Commissioners of Taxes*, (*supra*), within the reasoning of which it is plainly included, and of *Catlin v. Hull*, which the Court of Appeals, on that, as well as a subsequent occasion, adopted, as containing the true rule of law applicable to the disposition of questions of this description. Within these authorities the assessment now complained of was unauthorized by the statutes under which it was made, and it should, therefore, be reduced in conformity to the application which the relator made to the defendants for that purpose. This, according to the return made to the writ, will reduce the assessment of the relator's personal property to the sum of \$8000.

Judgment accordingly.

MARVIN, J. dissented.

[ERIE GENERAL TERM, May 4, 1868. Daniels, Marvin, Davis and Barker, Justices.]

## THE PEOPLE vs. STEPHEN P. SMITH.

A former decision, in an action between the same parties, upon the merits, so long as it remains unreversed, and not in any manner vacated or annulled, is not only binding, but is positively conclusive, upon the parties, in a subsequent action between them for the same cause.

Neither of them can be at liberty either to allege or prove that the facts put in issue in the previous action, and upon the trial of it adjudged and determined against the plaintiff, were not true. And without such allegation and proof the plaintiff cannot recover in the second action.

Where the decision and judgment contains only a simple direction that the complaint be dismissed, without any express finding of facts required to be negatived in order to warrant a recovery in the second action, it may be that the judgment should not be held to be a bar; but even in a case like that, the case is not free from doubt. *Per DANIELS, J.*

But where the facts themselves are adjudicated and found in the former action, the parties should be estopped by such finding, so far as those facts themselves may be brought in controversy in the second action, and may be essential to the right of recovery therein; the parties, as to such facts, having had their day in court, with a definite decision rendered upon them.

In an action upon a recognizance, taken before a county judge, the plaintiff, on the trial, was unable to prove that the recognizance had been filed in the office of the county clerk, (although such was the fact,) or that it had ever become in any manner a record of the court. The action being tried by the court, without a jury, upon an agreed statement of facts, the court found and decided "that the recognizance was never filed in, or made a record of, any court; that no record of such recognizance had been made, in any court; that to maintain an action upon a recognizance it must appear that it was filed in, or made a record of, the court in which it is returnable; and that the complaint of the plaintiff be dismissed, with costs." The judgment entered upon such decision recited, and stated these findings and conclusions of fact and law, and then adjudged and directed that the complaint be dismissed, with costs. In a subsequent action, brought by the plaintiff in that suit against the defendant therein, upon the same recognizance,

*Held* that the finding, in the previous action, that the recognizance had not been filed, and had not become a record, was conclusive upon the plaintiff, in the second action; and inasmuch as he could not properly recover without establishing the converse of those findings, judgment was properly directed for the defendant.

**T**HIS action is upon a recognizance, dated the 19th of May, 1865, taken at chambers, by and before the special county judge of Chautauqua county, conditioned

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for the appearance of one Warren, at the then next court of oyer and terminer, who stood indicted for perjury. The defendant executed the bond as one of the sureties therein. The complaint contains the necessary averments to charge the defendant, on account of the non-appearance of Warren.

The answer sets up, among other things, in bar of the action, a former suit upon the same bond, wherein the complaint was dismissed after a trial upon the merits.

Upon the trial, before a justice of this court, without a jury, the defendant had a judgment in his favor; from which the plaintiffs appealed to the general term.

*Nahum S. Scott*, for the appellants.

*Walter W. Holt*, for the respondent.

DANIELS, J. This action was brought upon a recognizance taken before the special county judge of Chautauqua county and filed in the office of the clerk of that county. Sufficient was shown upon the trial to render the defendant liable for the amount of the recognizance, unless the plaintiff was precluded from maintaining the action by reason of a former judgment. That judgment was rendered in the defendant's favor in an action brought upon, and to recover the amount of, the same recognizance. The plaintiff, on the trial of that action, was unable to prove that the recognizance, which was in fact filed, before it was commenced, had been filed in the office of the county clerk, or that it had ever become in any sense a record of the court. And without proof of that fact, no action could lawfully be maintained upon it. (*People v. Van Eps*, 4 Wend. 388. *People v. Huggins*, 10 id. 465. *People v. Kane*, 4 Denio, 531, 535, 536.)

That action was tried upon an agreed statement of facts, before the court, without a jury, which with the plead-

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ings, were submitted to the court for its decision. After due deliberation upon the case, the court found and decided "that the recognizance was never filed in, or made a record of, any court; that no record of such recognizance had been made in any court; that to maintain an action upon a recognizance it must appear that it was filed in or made a record of the court in which it is returnable; and that the complaint of the plaintiff be dismissed with costs." The judgment entered upon the decision recited and stated these findings and conclusions of fact and law, and then adjudged and directed that the complaint be dismissed with costs.

As the liability of the sureties in the recognizance was imperfect as long as the recognizance was not filed in the county clerk's office, or in any manner made a record of the court in which it was taken, the facts found and mentioned in the decision were of the very substance of the issue made by the pleadings. The case presented by the judgment in the former action is not merely one where the complaint was directed to be dismissed, but one in which the merits of the controversy were litigated, submitted and decided, and as a consequence thereof, the complaint was dismissed. In substance, therefore, it was a decision that the plaintiffs had no cause, or right of action, and that the defendant was therefore entitled to judgment. In order to justify or warrant a recovery in this action under the law as it is settled by the authorities already mentioned, it would be necessary that the court before which the trial was had should find that the conclusions contained in the decision and judgment in the first action were not true in point of fact, and that the converse of them was true. So that after a full hearing and consideration of the merits of the action as they were developed and exhibited by the proofs, it would appear from the records of this court, that the recognizance was not filed,

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and was not made a record of the court in which it was intended to be taken.

Under the law relating to this subject, that cannot be permitted. The first decision, as long as it remains unreversed, and not in any manner vacated or annulled, is not only binding, but it is positively conclusive upon the parties to the action. Neither of them can be at liberty either to allege or prove that the facts put in issue in the previous action, and upon the trial of it adjudged and determined against the plaintiffs, were not true. And such an allegation, and the support of it by evidence, were necessarily required to maintain the plaintiff's right to recover in the present case. It would violate a long established and well settled rule of law to permit this to be done.

Where the decision and judgment contains but a simple direction that the complaint be dismissed, without any express finding of facts required to be negatived in order to warrant a recovery in the second action, it may be that the judgment should not be held to be a bar, which is all that was decided in the case of *Coit v. Beard*, (33 Barb. 357; 12 Abb. 462.) But even in a case like that, the question is not free from embarrassment and doubt, as will appear by what is said in the decision of the cases of *Robbins v. Wells*, (26 How. 15;) and *Audubon v. Excelsior Ins. Co.* (27 N. Y. Rep. 216, 221.)

But where the facts themselves are adjudicated and found, every reason exists, that the principle of evidence is founded upon, for concluding parties by the result of their previous litigation, for holding them to be estopped by such finding, so far as those facts themselves may be brought in controversy in the second action, and may be essential to the right of recovery therein. For as to such facts the parties have had their day in court, with a definite decision rendered upon them.

In the case of *Eastmure v. Laws*, (5 Bing. N. C. 444,) where it was insisted that a verdict in a previous action

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was not conclusive as to the facts found by it, Tindal, chief justice, said in the course of his opinion, that "The question is whether after a precise issue on the same point has been found against the plaintiff, he may bring an action, and agitate the whole matter over again. There can be no doubt, if the plaintiff had sued the defendant for this sum in a former action, and after plea a verdict had been found against him, he could never have brought the matter again in question on the ground that he was not then prepared with evidence. Consistently with the decision of *Outram v. Morewood*, I cannot see how an estoppel can be set aside on the ground set up by this replication. In the case cited, which is reported, (3 *East*, 346,) Lord Ellenborough held that a recovery in any suit, upon issue joined on matter of title, is conclusive upon the subject matter of such title. "A finding upon title in trespass, not only operates as a bar to the future recovery of damages on the former injury, but also operates by way of estoppel to any action for an injury to the same supposed right of possession." "It is not the recovery, but the matter alleged by the party, and upon which the recovery proceeds, which creates the estoppel. The recovery of itself, in an action of trespass, is only a bar to the future recovery of damages for the same injury; but the estoppel precludes parties from contending to the contrary of that point, or matter of fact which having been once distinctly put in issue by them, has been on such issue joined, solemnly found against them." In *Marsh v. Pier*, (4 *Rawl.* 273,) it was held that "When a subject or question in controversy has been once settled by the judgment of a competent tribunal, it never ought to be permitted to be made the ground of a second suit between the same parties, or those claiming under them, as long as the judgment in the first suit remains unreversed. The case of *Smith v. Sherwood*, (4 *Conn. Rep.* 276,) is to the same effect. And so is *Demarest v. Darg*, (32 *N. Y. Rep.* 281.) (See



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also, 1 *Greenleaf on Evidence*, § 530; and *Miller v. Manice*, 6 *Hill*, 115.)

Within the rule maintained by these authorities, the finding in the previous action that the recognizance had not been filed, and had not become a record of the court of oyer and terminer in which it was taken, was conclusive upon the plaintiffs in the present one. And as long as the plaintiffs could not properly recover without establishing the converse of those findings, judgment was properly directed for the defendant.

In this respect this judgment very plainly differs from a mere judgment of nonsuit, which neither finds nor establishes any thing, and for the same reason it differs from a mere dismissal of the complaint. For it shows that the cause was submitted upon the merits, and not for a nonsuit, and that the merits of the controversy were passed upon and determined, and for that reason, solely, the complaint was directed to be dismissed. The judgment should therefore be affirmed.

BARKER, J. From the record and the proceedings had before the court, in the first action, it is at once apparent that such action was heard and disposed of on the merits, and an affirmative and positive judgment rendered therein, in favor of the defendant.

On the principle of *res adjudicata*, that action, and the judgment therein, is a legal bar to this.

It is argued by the counsel for the people, that the judgment being a dismissal of the complaint, its only effect is to nonsuit the plaintiffs, and it reserves to the plaintiffs the right to prosecute the action anew; that it being an action at law, the same legal effect is not given to the judgment dismissing the complaint, that is accorded to a like judgment in an action in equity.

Prior to the adoption of the Code, in the equity courts, where judgment was awarded to the defendant, after

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hearing and upon the merits, it was the usual and settled formula, to decree the dismissal of the complainant's bill. In actions at law, the issues of fact were tried by a jury, and upon their verdict the judgment was entered, the judgment record reciting the verdict of the jury, and declaring the judgment of the court thereon. Thus by the record in the respective courts it appeared that the subject matter of the suit had been heard, tried and disposed of upon the merits, and a positive and final judgment rendered.

Since the distinction between actions at law and suits in equity, and the forms of all such actions and suits, are abolished and *the action* may be tried by the court, without a jury, when the same is so tried by the court, its judgment may be expressed in the same form and with like effect in both classes of action. Then, when questions similar to the one at bar arise, the record and the proceedings in the action will be examined to determine the effect of the judgment of the court, and if it appears to have been heard and determined upon the merits, and an express judgment given in favor of either party, upon the subject in issue, then it must be regarded as a final judgment, and will be received as evidence, to sustain a plea of a prior suit in bar.

In view of the fact that in practice, under the present system, what are termed actions at law, when tried by the court, without a jury, are heard and disposed of in the same manner as a suit of an equitable nature, no sound reason can be assigned, against decreeing judgment for the defendant, in the same words, and giving to them the same legal effect in both cases.

I am of the opinion that the judgment in the prior suit is a bar to this action; and this conclusion is sustained by the cases of *Audubon v. The Excelsior Insurance Company*, (27 N. Y. Rep. 216,) and *Bostwick v. Abbott*, (40 Barb. 331.) The latter case was an action of an equitable nature, but

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the court did not place the decision on that ground, but upon the fact that it appeared from the record that the case was disposed of upon the merits and the judgment dismissing the complaint must be regarded as a final judgment in favor of the defendants.

The case of *Audubon v. Excelsior Insurance Company*, was an action at law, and was tried before the court without a jury. The evidence of the parties being produced to the court, an order was made and judgment entered thereon, dismissing the complaint, with costs. Afterwards the court on motion, modified the judgment, so as to make the judgment in terms simply a nonsuit. In the second suit, this judgment was pleaded in bar, and its effect was fully discussed in the Court of Appeals, and Judge Denio, said that, but for the modification of the judgment, it would have been a complete bar.

To the contrary is the case of *Coit v. Beard*, (33 Barb. 357,) where it was said by the court at general term, in the first district, that a judgment dismissing a complaint, in an action at law, when tried by the court without a jury, was not a bar to another suit, on the same cause of action; that in all respects it is identical with a judgment of nonsuit. The court cite as authority the case of *Harrison v. Wood*, (2 Duer, 50,) where the court held that dismissing a complaint, on motion, for want of prosecution, was not a bar to a second suit. The court also cite the twenty-sixth and twenty-seventh standing rules of the court, as to the effect of a dismissal of the complaint. I do not concur in the views expressed in *Coit v. Beard*, and do not regard it as well considered. Hence it had not better be followed.

The judgment should be affirmed, with costs.

MARVIN and DAVIS, JJ. concurred.

[ERIE GENERAL TERM, September 7, 1868. *Daniels, Marvin, Davis and Barker*, Justices.]

**RICHARD SCHELL vs. THE ERIE RAILWAY COMPANY and others.**

The Supreme Court of one judicial district, has no jurisdiction in an action pending in another district, to grant an injunction order, to restrain proceedings, in an action previously commenced and then pending in the district first mentioned. If such an injunction order is obtained it is void, and may be disregarded.

The theory that by bringing another suit, and simply laying the venue in a different county from that in which an action is already pending, the court can be divided up so as to enable one branch of it to enjoin suitors from proceeding in another branch, is entirely inconsistent with the existence of but one court which the constitution created. That court, in the very nature of things, has no power to enjoin a suitor in it from asking to be heard; and every attempt to do so, is void. *Per* CARDozo, J.

In an action brought in the Supreme Court by S. against a railway company, an injunction order was granted by a justice of the first district. Subsequently the railway company brought an action, in the same court, against S. and others, laying the venue in a county in the eighth district, and obtained from a different justice of the first district an injunction order stopping all proceedings in the action of S., restraining the clerk of the court from entering an order made by one of the judges, and forbidding the prosecution of S.'s suit, and other suits by him and others named, and directing that any person who might *thereafter* bring an action of the like nature, or intended to accomplish the same object, should, upon notice of such injunction order, desist and refrain from further prosecuting the same. *Held*, that the granting of the second injunction order was not a valid exercise of judicial power, and the order was void.

**THIS** is an appeal from an order made on the 19th of March, 1868, by Justice BARNARD, appointing a receiver.

The action was commenced, originally, against some of the defendants; afterwards, on the 14th of March, 1868, an order to show cause was granted, returnable forthwith, why a supplemental complaint should not be filed, and why a receiver should not be appointed of the proceeds of fifty thousand shares of stock, &c. These papers were served on Mr. Skidmore one of the defendants, and a director of the Erie Railway Company, in court, and the motion was immediately brought on, and no one appearing to oppose, was granted, and a receiver was appointed.

Previous to the hearing of this motion, a suit had been

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commenced in another district, upon which an injunction was obtained, restraining among others, this plaintiff from proceeding with his action, and from obtaining any appointment of a receiver therein. This injunction was served on Schell, on the 18th of March, as appeared by the affidavit. On the 16th of March, 1868, an order was made by Justice BARNARD, founded on the order of Justice CLERKE, requiring the Erie Railway Company to show cause on the 19th of March, before him, why the appointment of the 14th of March should not then be perfected, and a further order made as to the receiver, and why the order of Justice CLERKE should not be vacated. Upon the return of this order, the order of 19th of March was made, deciding that the order of Justice CLERKE should not be held to stay the plaintiff's proceedings; that the motion to vacate the appointment of a receiver be denied; and that the stay of proceedings in the order of Justice CLERKE should be vacated. He also gave the plaintiff leave to file a supplemental complaint, ordered the appointment of a receiver, and made other provisions as to security and accounting. From this order the defendants appealed to the general term.

*Jno. E. Burrill, D. D. Field and Jas. T. Brady*, for the appellants.

*Chas. A. Rapallo and Chas. O'Conor*, for the respondents.

CARDOZO, J. The opinion of Mr. Justice INGRAHAM, concedes that "the only difficulty in the way of sustaining" the order made by Mr. Justice BARNARD on the 19th of March, "is the order of Mr. Justice CLERKE in the case of the *Erie Railway Company* and *Whitney v. Vanderbilt*," and therefore, although I have considered the whole case, it will only be necessary for me to express my views upon this one matter, to show that in my judgment the order appealed from should be affirmed.

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I am of opinion that the order of Judge CLERKE was absolutely void, and consequently that anybody might lawfully disregard it.

The plaintiff in this case brought his action in this court against the Erie Railway Company and others and obtained an injunction from Justice BARNARD, in this district. After various proceedings in the action, the Erie Railway Company and Whitney brought a suit against Mr. Schell and others, laying the venue in Steuben county, and obtained from Justice CLERKE of this district an injunction stopping the cause of the plaintiff—restraining the clerk of the court from entering an order made by one of the judges, and not only forbidding the prosecution of this and other suits by this plaintiff and others named, but directing that any other person who might *thereafter* bring an action of the like nature, or intended to accomplish the object sought to be obtained by this suit, should, upon notice of that order of injunction, desist and refrain from further prosecuting the same. An injunction which, whether considered with reference to the singularity and extent of its provisions, or the circumstance of it being issued by a judge of this district in an action triable in Steuben county, I venture to assert has no precedent in the books. I do not stop to inquire why those who wished to bring an action in Steuben county were not told to go to that district for any preliminary order, instead of having it granted to them by a justice of this district. Certainly that would have been the ordinary course—it having hitherto been considered that the justices in this district had quite enough occupation, without interfering in suits triable in other districts; and a departure from the general practice might reasonably provoke remark and inquiries, which however, I do not deem it right or worth while to pursue. The real question is, was that injunction a valid exercise of judicial power, or was it a void act? No such jurisdiction was exercised by the court of chancery in this

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state, in respect to a cause pending in that court. This question was pointedly presented and determined in two cases. (*Smith v. American Life Insurance and Trust Company, Clarke Ch. 307. Lane v. Clark, Id. 309.*) In laying down the rule that an injunction would not be granted by the court of chancery to stay a suit in that court, Vice Chancellor Whittlesey, in the case first above mentioned, said: "If a contrary rule should be adopted, it would be difficult in some cases to foresee any termination to litigation;" an apprehension which the present extraordinary proceedings shows was very well founded. The vice chancellor further said, and I cite it to show how unnecessary the course pursued in this case was, and how simple the proper procedure would have been, "this rule will not work any injury. A party, privy, or even a stranger to the pending suit is not without redress. He may apply by petition in the original cause, for such an order as the case made by his petition will entitle him to." Again, in *Lane v. Clark, (supra,)* the vice chancellor said: "Proceedings in this court will not be restrained by injunction issuing out of this court upon a new bill, whether filed by a party, privy, or stranger to the old bill. The only mode is to apply by petition, for an order."

The jurisdiction of the court of chancery to restrain proceedings in other courts, acting of course upon the parties to the litigation and not the courts, is undoubted; but that is a very different thing from enjoining the parties from prosecuting the suit in the court of chancery itself. Such an absurdity—as in effect to enjoin itself—the cases above cited show that the court of chancery in this state would not commit.

The question of the jurisdiction of one court to enjoin proceedings pending in another, arose in the Superior Court of this city, after the adoption of the constitution of 1846, in the case of *Grant v. Quick, (5 Sandf. 612,)* Judge Duer said: "The only ground upon which the

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court of chancery formerly acted in granting an injunction in cases like the present, was the inability of the court of law in which a suit was pending, to grant the necessary relief; but as since the Code, the jurisdiction of all our courts is equitable as well as legal, or more properly, as the distinction between legal and equitable, except in reference to the nature of the relief demanded, is now abolished, the reasons by which the exercise of a power, always invidious, and frequently abused, could alone be justified, have ceased to exist, and have left a case to which the maxim emphatically applies "*cessante ratione, cessat etiam lex.*" He proceeds to show that the court of common pleas in which the action sought to be enjoined was pending, had complete power to give relief to the parties, and then says: "The previous jurisdiction which that court has acquired, I have no right and will not attempt to disturb." This case decides that the necessity for the exercise of the right to enjoin a suit in another court having ceased, the law—the jurisdiction—to do so also ceased. And that case was communicated by Judge Duer to the judges of the Supreme Court in the first district, the judges of the court of Common Pleas and to the judges of the Superior Court at a consultation held by all of them, and unanimously approved. It will be difficult for the courts thus concurring, to maintain that jurisdiction exists, any longer, in one court to enjoin the proceedings in a suit in another court having full power to hear and determine the whole litigation, and to protect the rights of all parties connected with it.

This really disposes of the present case; for there can be no pretense that the Supreme Court, from the moment Mr. Schell's suit was commenced, had not full jurisdiction; and indeed it is that very jurisdiction which is sought to be invoked by the parties who obtained the injunction from Judge CLERKE.

The constitution of 1846, designing to blend legal and



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equitable remedies within one jurisdiction, abolished the court of chancery and created one court termed the Supreme Court, having general jurisdiction at law and in equity; consisting of many judges but all constituting but one court; and when either judge acts judicially the court acts. In that court Mr. Schell brought his suit against the Erie Railway Company and others, and an injunction which should prevent his appearing at the bar of the only tribunal to which he could apply for relief, would be, as it was aptly termed by the distinguished counsel for the respondents "a monster in jurisprudence." Every body interested could, on motion, have been made a party to the suit brought by Mr. Schell, and all the relief that any one was entitled to could have thus been obtained. The theory that by bringing another suit and simply laying the venue in a different county, the court could be divided up so as to enable one branch of it to enjoin suitors from proceeding in another branch of it, is entirely inconsistent with the existence of but one court which the constitution created. That court, in the very nature of things, has no power to enjoin a suitor in it from asking to be heard, and every attempt to do so is simply and only void.

The idea that a cause by such maneuvers as have been resorted to here, can be withdrawn from one judge of this court and taken possession of by another; that thus one judge of the same, and no other power, can practically prevent his associate from exercising his judicial functions; that thus a case may be taken from judge to judge whenever one of the parties fears that an unfavorable decision is about to be rendered by the judge who up to that time had sat in the cause; and that thus a decision of a suit may be constantly indefinitely postponed at the will of one of the litigants, only deserves to be noticed as being a curiosity in legal tactics, a remarkable exhibition of inventive genius and fertility of expedients to embarrass a

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suit, which this extraordinarily conducted litigation has developed.

For these, among other reasons, I think the injunction of Justice CLERKE absolutely void, and no impediment to the order of Justice BARNARD.

I have not overlooked the remark of the eminent senior counsel for the appellants, that "the due order of judicial proceedings is involved." I really think it is. No one, who reviews the proceedings in this litigation, can fail to see that unless the view I have taken of the question be sound, almost endless litigation and inextricable confusion may be created in nearly every case of any importance; and above all that if judges of the same court, instead of leaving each case to its "due order of proceedings," shall countenance efforts to circumvent and defeat the orders and decisions of each other, the court itself will soon justly forfeit the confidence of the public, fall into disrepute, and its usefulness be seriously impaired, if not wholly destroyed. Such a practice as that disclosed by this litigation, of judges sanctioning attempts to counteract the orders of each other in the progress of a suit, I confess is new and shocking to me. It had no existence in the practice of the court of which I was recently a member, where the judges are not only gentlemen, having confidence in each other, never ascribing improper motives in judicial action to either of their associates, and never permitting any one to impute such to either before the other, but are scrupulously careful that the conduct of every legal proceeding shall be "due and orderly;" and I trust that we have seen the last, in this high tribunal, of such practice as this case has exhibited. No apprehension, real or fancied, that any judge is about either innocently or willfully, to do a wrong, can palliate, much less justify it. For any such wrong, there are abundant means of redress and to those, unaided by judges in such artifices as have

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been attempted in these proceedings, everybody should be left to resort.

The order appealed from should be affirmed.

GEO. G. BARNARD, J. concurred.

INGRAHAM J. (dissenting.) The views I entertain of the proceeding in this case render an examination of the merits unnecessary, on this appeal.

The first order, of the 14th March, does not appear to be relied on for sustaining the appointment of the receiver. It was made in court, on an order issued there, and served on a director in court, who was at that time in the custody of the sheriff, and who could not therefore have the opportunity to confer with the officers of the company, or prepare the necessary papers, or adopt any measures to show cause against the application. Such a service cannot be considered a proper service upon the company. When the law provides for serving papers on any officer of a company, it must intend that a reasonable time shall be allowed such officer to place the papers in the possession of those whose duty it is to protect the company from the measures intended to be taken against it. Without such time, it is evident that any company may be deprived of its rights and property.

I do not mean to deny that a judge may not in a proper case, make an order returnable before him forthwith, when the parties are before him and can be then served, but under ordinary circumstances such a course of proceeding is not desirable.

This order, however, was not relied on, and the order of the 16th March, appears to have been made for the purpose of perfecting the appointment of the receiver then made. On the return to this order, the order appealed from was made. No objection is made to want of notice on this last motion, and the only difficulty in the way of

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sustaining it is the order of Justice CLERKE in the case of *The Erie Railway Company* and *Whitney v. Vanderbilt and others*.

This order stayed the plaintiff's proceedings, and if not properly vacated, all such proceedings were irregular and should be set aside. The order of Justice BARNARD to show cause why the stay of proceedings should not be vacated, would have been sufficient to justify him in vacating such stay, if the action had been in this district; but there is nothing in that order which warranted the portion of the order of the 19th March, which denied the motion founded on the order to show cause, granted by Justice CLERKE. No such object was contemplated by the order to show cause, of 16th March, but a mere modification of the stay of proceedings therein contained.

The great difficulty, however, lies in the fact that the action in which that injunction was granted, was brought in the seventh district. In all actions triable in any other district than the first, the judges of this district have no authority to hear motions within the first district. The 401st section of the Code, subdivision 4 provides that "motions upon notice must be made within the district in which the action is triable, or in a county adjoining; and no motion upon notice, can be made in the first judicial district, in an action triable elsewhere." This section forbids the hearing of any such motion in this district, in an action pending in the seventh district, and would make the decision on that order a nullity.

Two grounds are relied on to take this out of the above provision. One is that the order of Justice CLERKE staying the plaintiff's proceeding may be disregarded by the court when the case is before them; and the other that such an order staying proceedings in another action pending in the same court, is irregular and without any force. I think neither ground is sufficient. The court may disregard such an order, if on hearing a cause, it should see

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fit to do so, although as between judges of the same court, such a course of proceeding is not desirable. But the party to the suit is enjoined, and not the court. Such party has no right to apply for any order while the injunction is in force, except to vacate it, and the power to vacate it did not rest with a judge in the first district. He still remains subject to its restraint, and any application by him, in violation of it, makes his proceeding irregular. Such injunction acts, not upon the court, but on the party. (*N. Y. and N. H. Railroad Company v. Schuyler*, 17 *How. Pr.* 464.) Even if erroneously granted, the injunction should be obeyed, until vacated. (*The People v. Sturtevant*, 5 *Seld.* 263. *Moat v. Holbein*, 2 *Edw.* 188. *Peck v. Yorks*, 32 *How. Pr.* 408.)

It is also suggested that it was irregular in Judge CLERKE, to stay proceedings in another action in the same court. Whether it be so or not is not necessary for me to decide. The experience in this litigation shows that it does not tend to a due administration of justice. There would have been no difficulty at first for the defendants to do as they did on this motion now under consideration, to have appealed from the first order that was made, and obtained a stay in the mean while. Such a course would have protected all the parties, and avoided much of the confusion which has arisen from conflicting orders obtained from different judges in the same court.

This order having been made while the injunction was in full force in the action brought by Whitney, and that injunction still remaining in force, made the act of the plaintiff in this suit, in applying for a receiver, irregular and the order should on that account be reversed.

Order affirmed.

[NEW YORK GENERAL TERM, April 6, 1868. *Geo. G. Barnard, Ingraham and Cardozo*, Justices.]

JOHN J. HOWELL and JOSEPH M. DEVEAU vs. THE CHICAGO  
AND NORTH WESTERN RAILWAY COMPANY and others.

However objectionable the issue of stock dividends by a corporation, may appear to be, as bearing upon the value of the stock, such considerations are more properly to be addressed to the board of directors than to the court, on a motion to continue an injunction.

Under ordinary circumstances, where a corporation has earned a dividend, and it desires to retain the moneys so earned, for the purposes of the company, either in making improvements on its property or for the payment of its debts, it would be no violation of law to retain such moneys and in lieu thereof to issue to the stockholders a corresponding amount of stock.

The election to do either rests with the board of directors, and if the company has the power to increase the capital stock, for any purpose, either mode of making such increase is not a violation of law, and affords no ground for an injunction to restrain them.

If a corporation has the power to increase its capital, it is immaterial whether such increase is made by awarding the stock to stockholders as dividends, in lieu of money, retaining the money for the purposes of the company, or by paying the stockholders the dividends in cash from the earnings of the company and selling the stock in the market, to raise money for the use of the corporation.

It may be doubted whether a statement, made by a board of directors, in a report, avowing their determination not to make any further increase of the capital stock, would be sufficient to warrant the restraining of the company from doing an act expressly authorized by statute; or even if it had such an effect, as to the board by which it was made, whether any subsequent board could thus be deprived of the powers conferred upon it by law. *Per* INGRAHAM, J.

By an act of consolidation, between railroad companies, it was agreed that the preferred stock should be entitled first to seven per cent from the income of the consolidated road; then the common stock was to have seven per cent; then the preferred stock was to have three per cent further; and afterwards the common stock could share in the balance. Subsequently, a dividend was declared by which ten per cent on the amount of the capital was awarded to both classes of the stock, but such dividend was made payable in preferred stock to the holders of preferred stock, and in common stock to the holders of stock in that class. By this distribution, at the then value of the stock, the holder of a share of preferred stock received stock to the market value of about \$8, and the holder of a share of common stock received stock to the value of about \$7. *Held* that this gave to the holder of the common stock all he had a right to claim, and all that he was entitled to until the dividend of the preferred stock amounted to ten cent. And that whether, therefore, the dividend was estimated in the nominal

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value of the stock, or as the cash value, there was no departure from the contract with the holders of the preferred stock, in such dividend.

Previous to the Code, foreign corporations were not the subject of litigation in the courts of this state, except when proceeded against by attachment of their property for the collection of a debt or the redress of a wrong. And the Code was not intended to extend that power any further than it existed at that time; although the language of the Code is more general, and might be construed more liberally.

Although it is the duty of the state to provide for the collection of debts from foreign corporations, due to its citizens, and to protect its citizens from fraud, by all the means in its power, whether against domestic or foreign wrongdoers, this does not authorize the courts to regulate the internal affairs of foreign corporations. The courts possess no visitatorial power over them.

The court will not enjoin the directors of a foreign corporation from paying a dividend, where no debt is due to the plaintiff, and he has no claim for redress for any wrong, and his only ground for the injunction is a supposed error on the part of the directors in making the dividend.

For such a cause he must seek redress in the courts of the state where the company was incorporated; unless *fraud* is contemplated, by which the property of stockholders who are citizens of this state is placed in jeopardy.

Although it be not affirmed that in no cases should the courts exercise jurisdiction; yet even if the power exists to compel a foreign corporation to come into our courts and become a party to litigation here, still, where the cause of action arises abroad; where it affects only the internal government of the corporation; where the judgment, if rendered, cannot be in any way enforced against them, except by injunction against individual members of the corporation; and the party has an ample remedy in the state where the corporation has a legal existence; the courts here may well decline exercising an equitable jurisdiction, in such a case. *Per INGERSHAM, J.*

**M**OTION to continue an injunction restraining the payment of a dividend.

The plaintiffs, claiming to be the owners of bonds and common stock of the Chicago and Northwestern Railway Company, ask an injunction against the defendants, to restrain them from paying a stock dividend declared by them on the preferred and common stock. The dividend was to be paid to each class of stockholders, in the same kind of stock as that held by them. The plaintiffs claim that the company has no authority to make stock divi-

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dends, and if they have, that the distribution is unequal in giving preferred stock to one class and common stock to the other; and they also claim that the company is bound by a previous resolution, adopted by them, not to issue any preferred stock beyond the amount at that time in existence.

*J. T. Pierce and C. A. Rapallo*, for the plaintiffs.

*S. J. Tilden*, for the defendants.

INGRAHAM, J. However objectionable the issue of stock dividends may appear to be, as bearing upon the value of the stock, such considerations are more properly to be addressed to the board of directors than to the court on such a motion as the present. Under ordinary circumstances, where the company has earned a dividend, and they desire at the same time to retain the moneys so earned, for the purposes of the company, either in making improvements on the road or for the payment of its debts, it would be no violation of law to retain such moneys and in lieu thereof to issue to the stockholders a corresponding amount of stock. The election to do either rests with the board of directors, and if the company has the power to increase the capital stock, for any purpose, either mode of making such increase is not a violation of law, and affords no ground for an injunction to restrain them.

That this company has the power to increase its capital stock, both preferred and common stock, is apparent from the charter and laws relative to the corporations which are united in the present corporation, and by the acts authorizing the consolidation, both of the state of Illinois and the state of Wisconsin, as well as the articles of consolidation.

Having this power to increase its capital, it becomes immaterial whether such increase is made by awarding



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the stock to stockholders as dividends in lieu of money, retaining the money for the purposes of the company, or by paying the stockholders the dividends in cash from the earnings of the company and selling the stock in the market to raise money for the use of the corporation.

In the present case the stock is passed to the stockholders at its par value, while if sold in the market it must have been so sold at a discount of twenty per cent; and to that extent it benefits the stockholders, if a dividend of ten per cent was to be declared.

It is urged, however, that the company, in their report made in 1865, avowed their determination not to make any further increase of the capital stock, however urgent the necessity for it might be.

It may be doubted whether such a statement made in a report of a board of directors, would be sufficient to warrant the restraining the company from doing an act authorized expressly by statute; or even if it had such an effect, as to that board by which it was passed, whether any subsequent board could thus be deprived of the powers conferred upon it by law. It formed no part of the terms on which the bonds were subscribed for, and can be considered as nothing more than an expression of a line of policy which the then existing board of directors thought it best to adopt, but which their successors were by no means bound to adhere to or follow.

It is also objected that this dividend is unequal. By the act of consolidation it was agreed that the preferred stock should be entitled first to seven per cent from the income; then the common stock was to have seven per cent; then the preferred stock was to have three per cent further; and afterwards the common stock could share in the balance. In this dividend, ten per cent on the amount of the capital has been awarded to both classes of the stock, but such dividend is made payable in preferred stock to the holders of preferred stock, and in common

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stock to the holders of stock in that class. At the present value of the stock the holder of a share of preferred stock receives stock to the market value of about \$8, and the holder of a share of common stock receives stock to the value of about \$7. This gives the holder of the common stock all he has a right to claim, and all that he is entitled to until the dividend of the preferred stock amounts to ten per cent. Whether, therefore, the dividend is estimated in the nominal value of the stock, or as the cash value, it appears that there is no departure from the contract with the holders of the preferred stock in the dividend now declared.

That the issue of additional preferred stock may have the effect to increase the amount of that class and thereby reduce the income which would be applicable to a general dividend is probable, but the same result would follow from a sale of preferred stock in the market, which I think the company would have the power to do, under their charters.

From the examination I have given to these questions I am of the opinion that there is nothing in the acts complained of in regard to the dividend, which shows any unauthorized or illegal act, or which authorizes the supposition that any fraudulent intent existed, on the part of the directors, in making this dividend. On the contrary, they have acted in compliance with the wishes of a very large majority of the stockholders of both classes, as expressed by their votes in favor of this dividend. Although that would afford no reason why the company should not be enjoined from doing a fraudulent or illegal act, yet it does afford to the board of directors an approval of their course, and is entitled to consideration when the question becomes one of expediency and not of legality.

There are, however, other considerations which, in my judgment, should have a controlling influence in the decision of these questions. This corporation derives its

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existence from the legislation of other states than that of New York. No part of its road or franchise is exercised within this state, and we can in nowise reach the corporation, except by attaching property within the state. Some of its directors reside here, and they may be forbidden to act, but such an injunction can be rendered nugatory at any moment by a resignation and substitution of others in their places. A disobedience of the order of the court can be obviated by keeping the office of the company, and appointing directors living in other states. Previous to the Code, foreign corporations were not the subject of litigation in the courts of this state, except when proceeded against by attachment of their property for the collection of a debt or the redress of a wrong. I do not think the Code was intended to extend that power any further than it existed at that time. It is true the language of the Code is more general, and might be construed more liberally. But when we remember the utter inability of the courts to enforce any other remedy beyond the bounds of the state, it will be apparent that such litigation will in most cases prove useless. It is the duty of the state to provide for the collection of debts from foreign corporations, due to its citizens, and this has been done; and it is the duty of the state to protect its citizens from fraud, by all the means in its power, whether against domestic or foreign wrongdoers. This, however, does not authorize the courts to regulate the internal affairs of foreign corporations. The courts possess no visitatorial power over them. We can enforce no forfeiture of charter for violation of law; nor can we remove directors for misconduct. These powers all properly belong to the courts of the state from which they derive their existence. It is for these reasons I think there is no propriety in enjoining the defendants, in the present case. No debt is due to the plaintiff. He has no claim for redress for any wrong, and his only ground for the injunction is a supposed error

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on the part of the directors in making the dividend. I think for such a cause he must seek redress in the courts of the state where the company was incorporated; unless as in some other cases that have been before us, fraud was contemplated by which the property of stockholders who were citizens of this state was placed in jeopardy. No fraud is charged, in this case, and even if it had been, it is fully disproved by the affidavits submitted on this motion.

There has been a wrong impression entertained since the decision of *Griffith v. Scott and others*, in this district, that the court intended in that case to hold that we had jurisdiction and should exercise it, in all cases, over foreign corporations. That case warranted no such conclusion. There the charge was a fraudulent contract between individuals who were directors of two companies at the west, by which the stockholders in one of the companies would have been deprived of all interest therein, and would be without redress. Those directors lived in New York, and others here were connected with them, in the arrangement, who were only to be reached by proceedings here.

So in *Dart v. The Farmers' Bank*, (27 Barb. 337,) the action was to recover property from the defendants belonging to a resident in New York, and the appearance of the defendants, in the action, was held sufficient to make them subject to the jurisdiction of the court, on that account.

Views similar to those which I have here expressed were stated by ROOSEVELT, J. in *The Cumberland Coal Company v. The Hoffman Coal Company*, (30 Barb. 159, 171.) He says: "Foreign corporations may, in some instances, sue or be sued in our courts, but to warrant the proceeding, there must be either a necessity or a fitness suggested by the peculiar circumstances. The cause of action, or the subject, or at least some property to be acted upon, must

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have arisen or be situated within our jurisdiction. Without these qualifications, or one of them, the judgment, should the court render it, would be a nullity. It would operate on nothing in the state, and be regarded by nothing out of it."

I do not mean to be understood, that in no cases should the courts exercise jurisdiction; but even if the power exists to compel a foreign corporation to come into our courts and become a party to litigation here, still, where the cause of action arises abroad, where it affects only the internal government of the corporation, where the judgment, if rendered, cannot be in any way enforced against them, except by injunction against individual members of the corporation, and the party has an ample remedy in the state where the corporation has a legal existence, the courts here may well decline exercising an equitable jurisdiction in such a case.

The conclusion to which I have arrived is, that there is no ground for continuing this injunction.

Motion denied.

[NEW YORK SPECIAL TERM, June 27, 1868. *Ingraham*, Justice.]

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 KERN vs. TOWSLEY.

If words are spoken of a person charging him, in express terms, with the crime of perjury, they are actionable without proof of any extrinsic facts to show their meaning. Such words necessarily import that the person charged has sworn falsely upon a material point, in a judicial proceeding before a court or officer of competent jurisdiction.

So if the words uttered, although not charging perjury in express terms, necessarily imply that offense.

In like manner, if the words used to express the charge, are such, in the sense in which they would naturally be understood, as to convey to the minds of those to whom they are addressed, the impression that the plaintiff has

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committed perjury, and that the defendant intended to be so understood by those who heard him, such words will, of themselves, warrant a verdict for the plaintiff, in case the jury find that they were uttered with the intention above stated, and were so understood.

The defendant, on being reminded by the plaintiff of a law suit which he, (the defendant,) had recently lost, said, "Yes, your false swearing at that trial." Being told that he had better not accuse the plaintiff, again, of swearing false, he said: "Any man who professed to be a Christian, as you do, and went into the box and swore false as you did, at that trial, had better join the church once more," &c. The charge of swearing false, in the suit, was repeated five or six times. The defendant also said that "The folks who belonged to the church and built tall steeples thought they could swear false, or do any thing they had a mind to." *Held*, that the slander admitted that a suit was pending, and it was to be intended that what the plaintiff swore to was material; and that the words were sufficient to warrant a finding in favor of the plaintiff, without proof that the suit was in a court of competent jurisdiction, or that the plaintiff swore falsely with a corrupt intent.

No question can arise upon a bill of exceptions, as to the sufficiency of the complaint, where testimony offered by the plaintiff is received without objection, and the defendant's counsel does not suggest that the complaint is insufficient, until after the plaintiff has proved his case and rested.

At that stage of the trial, the defendant may raise the question as to the sufficiency of the complaint, by a motion to strike out so much of the testimony as tends to prove matters not alleged in the complaint.

Defects in the complaint may be stated as a ground for a motion for a nonsuit; but if the testimony given without objection is sufficient to establish a cause of action, the motion should be denied.

**T**HIS was an action for slander. The words complained of are set forth in the opinion of the court. On the trial, before Justice E. D. SMITH and a jury, after the plaintiff had proved the uttering by the defendant of the words, as charged, and rested, the defendant moved for a nonsuit upon the following grounds, viz:

1st. That the complaint did not state a cause of action for the reason that the words were not actionable in themselves, and there was no colloquium alleging the existence of an action before a court of competent jurisdiction, or that the plaintiff was a witness duly sworn, and gave material testimony, or that the words spoken referred to such testimony.

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2d. That the plaintiff's evidence entirely failed to prove a cause of action, for the reason that there was no proof of the existence of a suit in a court of competent jurisdiction, or that the plaintiff was ever sworn as a witness in any suit, or gave evidence in any suit which was material, or that the words used by the defendant had reference to any suit.

3d. That the words spoken were not actionable in themselves, and no collateral circumstances were proved to make them actionable.

The court denied the motion for a nonsuit, and the defendant's counsel duly excepted to such ruling.

The defendant's counsel then asked the court to charge the jury that the plaintiff could not recover unless there was positive proof before them that there was a suit in existence in a court that had jurisdiction and a right to swear witnesses, and that the plaintiff was sworn and gave testimony material to the issue. The court so charged; saying, however, that the jury might infer that, from the conversation of the parties, without other proof. The defendant excepted.

The defendant's counsel then further requested the court to charge the jury that there must be proof of the existence of the suit, and of the plaintiff's being a witness and giving material evidence, aside from the conversation between the parties. The court declined so to charge, and the defendant's counsel duly excepted.

The jury then retired, and found a verdict for the plaintiff for \$500, which was duly entered in the minutes of the clerk.

Whereupon, on motion of the defendant, the court ordered a stay of proceedings for sixty days, to enable the defendant to prepare a case and exceptions on which to move for a new trial, and ordered that such exceptions be heard in the first instance at general term.

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*C. H. Weed*, for the plaintiff. I. The words used, contain no doubtful meaning; no bystander could mistake their import. They imply perjury—the charge is perjury with reference to evidence given on the trial. Persons would so ordinarily understand it, and that the suit was lost by the plaintiff's false swearing in the suit. The jury found, as a question of fact, that the language imported perjury, which is conclusive. The words are to be taken in their natural meaning. Bystanders would naturally understand them to import a crime, as strong as the English language can express it. (*Dias v. Short*, 16 How. 322. 33 Barb. 618. 42 *id.* 326.) The 164th section of the Code was intended to change the old rule of pleading in actions of this character, and says it shall be sufficient to state generally that the words were published or spoken concerning the plaintiff. This complaint charges that the words were spoken of the plaintiff, and in the language of the section. It alleges all those extrinsic facts which are essential to show that the words used had reference to material testimony given by the plaintiff in a legal proceeding, with a statement of the time and place where the words were spoken, and with reference to a suit. It charges a crime, an indictable offense. The usual practice is for the defendant to demur, where the complaint is defective upon its face, and the intent of the 144th section of the Code is that such a course should be pursued. This complaint would have been held good on demurrer. (*Wesley v. Bennett*, 5 Abb. 498. *Walrath v. Nellis*, 17 How. Pr. 72.)

II. It was unnecessary to allege that there was a suit; that the plaintiff was sworn on the trial and gave material evidence; for the words used by the defendant admitted it. The words admit there was a suit between the parties; that the plaintiff was sworn in the suit; that the plaintiff gave material evidence; that there was a court of competent jurisdiction; by the defendant saying that "by your



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false swearing I lost the suit." The charge of going into the box to swear false, implies, if not admits, and charges that he did it willfully. This was not mere idle talk of the defendant. He meant that the plaintiff was guilty of perjury; that those who heard him should so understand it. These words explain themselves. It is unnecessary to allege or prove that which is admitted. (*Jacobs v. Fyler*, 3 *Hill*, 572.)

III. The words charge crime, and *per se* import perjury, as strong and with as much certainty as any words can be used in the English language, and are actionable in themselves. The charge is made with reference to evidence given on a trial. There being a charge of false swearing in a suit, the rest is presumed. (20 *John*. 344, 351. 11 *Wend*. 38. 8 *id.* 573. 6 *John*. 82. 25 *Wend*. 413.) Had the words complained of been, "You have perjured yourself," there could be no question; for it is then presumed and well settled that everything took place before a court of competent jurisdiction. The same thing is here expressed, only in different language. The court having left the fair interpretation and meaning of the words and language used by the defendant, to the jury, and they having found the defendant did charge the crime of perjury against the plaintiff, the verdict aids any defect in the pleading, even if any such averment was necessary. (16 *How. Pr.* 322.)

*Burton & Ten Eyck*, for the defendant. I. The complaint does not state a cause of action. This point was raised at the trial, and the court sustained it and offered to allow the plaintiff to amend his complaint on payment of costs, which he declined to do, whereupon the court decided to let him go on at his own risk and give his proofs. The motion for a nonsuit was renewed at the conclusion of the plaintiff's evidence, and denied. This was error. The words alleged in the complaint are not

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actionable *per se*. (*Vaughan v. Havens*, 8 John. 107. *Crookshank v. Gray*, 20 id. 344. *Ward v. Clark*, 2 id. 9. *Stafford v. Green*, 1 id. 505. *Phincle v. Vaughan*, 12 Barb. 215. *Ayres v. Covill*, 18 id. 260.) And there is no colloquium containing the proper averments to make them actionable. The charge contained in the complaint is one of false swearing. The plaintiff alleges that the defendant said of and concerning him: "You swore false in the suit I had with you a few days ago in the county court, you would not have beat me had you not sworn false on that trial." This is the substance of the charge, and certainly these words contain nothing which fairly and naturally import that the defendant meant to charge the plaintiff with the crime of perjury. There is no allegation that he had made himself amenable to any of the pains or penalties attached to the crime of perjury by false swearing, but unless this meaning can be attached to these words, they are not actionable *per se*. The rule formerly was that when alleged slanderous words require a knowledge of extrinsic facts, either to show their meaning or their application to the plaintiff, all such facts must be averred in the pleadings and proved. (*Miller v. Maxwell*, 16 Wend. 9.) The only change made by the Code in this respect, is to dispense with such averment of extrinsic facts as merely show the applicability of the slander to the plaintiff. (*Code*, § 164. 5 *How. Pr.* 171. 6 id. 99.) It is still necessary, as it formerly was, to aver and prove any facts necessary to explain the meaning of the words used. (*Dias v. Short*, 16 *How. Pr.* 322. *Kinney v. Nash*, 3 *Comst.* 177.) But in this case there are no averments or proof that a suit was ever in existence in any court of competent jurisdiction, or that the plaintiff was sworn as a witness in any action and that the words alleged referred to his testimony in any action. If it shall be claimed that the words themselves import the crime of perjury, inasmuch as they refer to a suit in the county

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court between the parties, then we answer that the county court is not a court of original jurisdiction, and for ought that appears, the suit referred to may have been one which the county court had no jurisdiction to try, and false swearing in a court of competent jurisdiction, is not always perjury, and if it is claimed that the words, "You would not have beat me had you not sworn false," import perjury, then we say this cannot be so, because the false swearing would have the same effect whether it was done innocently or corruptly in a way to make it perjury. The misstatement of facts would be the same and have the same effect on the result of the action from whatever motive it was done, whether good or bad, and yet in the one case it would not be perjury, and in the other it would. It is sufficient, however, that the plaintiff has chosen to designate a court not of original jurisdiction and has entirely neglected to aver or prove any facts showing jurisdiction of the particular action referred to by him. Nothing can be claimed by the plaintiff on account of the inuendoes contained in the complaint. The office of an inuendo is to connect the words spoken with persons or facts previously mentioned, and being merely explanatory, cannot supply the sense of words, enlarge their meaning, or supply or alter them when they are deficient. Any defect, therefore, in the inuendo, such as that it is not supported by the prefatory extrinsic facts, or that it enlarges their meaning, or alters them, or substitutes other words in their place, is a defect on the face of the pleading. This rule, requiring the preliminary statement of extrinsic facts to support an inuendo, is as indispensable now as under our former system. (*Blaisdell v. Raymond*, 14 *How. Pr.* 267. *Caldwell v. Raymond*, 2 *Abb.* 193. *Fry v. Bennett*, 5 *Sandf.* 65.) The case of *Jacobs v. Fyler*, (3 *Hill*, 574,) cited in the court below, and relied upon by his honor to sustain the charge given, does not go to the extent claimed, and besides has been virtually overruled in

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the subsequent case of *Emery v. Miller*, (1 Denio, 208.) There is, however, a broad distinction between the case of *Jacobs v. Fyler* and this case. In the former case there was a proper colloquium in the complaint, and the only question was as to the sufficiency of the proofs to sustain the averments of the complaint, while in this case the point is that there are no averments in the complaint sufficient to make the words actionable. The cases are therefore not analogous.

II. No cause of action was proven on the trial. The words proven are not actionable in themselves, as we have before shown, and can only be made so by averring and proving extrinsic facts and circumstances to point their meaning. In all cases in which words of the tenor of those proven in this action have been held actionable *per se* they were connected with some suit or proceeding in which perjury might have been committed. This will be evident from an examination of the cases relied upon by the plaintiff, and others not cited, in all of which the charge in some way pointed to the crime of perjury. In no case have such words standing alone been held actionable *per se*. But it will be observed that in the words proven, the defendant nowhere refers to a court, nor does he intimate in any way that the plaintiff by false swearing has become liable to any of the pains or penalties of the crime of perjury, and yet is the very point upon which this class of cases turn, viz. whether or not the defendant designed, and his words naturally import, that the plaintiff had committed perjury. If they do not, then they are not actionable *per se*. There being no such natural import in the words proven and no proof of extrinsic facts to point them; no cause of action is proven. (*See cases before cited.*)

III. The exceptions taken by the defendant to the charge of his honor in the court below, were valid, and should be sustained. The portions of the charge excepted

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to, leave the jury to infer the existence of a suit between the parties in a court of competent jurisdiction and that the plaintiff was duly sworn on such suit and gave material testimony, of which facts there was no proof before them. Such a doctrine would be a gross perversion of justice, and overturn all the well settled principles of evidence. Whether or not there had been a suit between the parties in which the plaintiff had been sworn as a witness, was a question of fact, and should be proved in the same way as any other question of fact, and could no more be inferred by the jury, than the speaking of the words themselves. To allow juries to infer such facts without evidence before them, would be giving to juries an *arbitrary power* to manufacture testimony to an unlimited extent, because if they have a right to infer the existence of one fact of which there is no proof before them, they have of another, and in that way the most monstrous injustice could and would be perpetrated under the forms of law. The only inferences which juries have a right to draw, are inferences from the evidence before them. For instance; if the plaintiff in this action had proved by competent testimony the existence of a suit between the parties, and that the plaintiff was duly sworn and gave material testimony on such suit, and that he had then proved the speaking of the words as he did prove them, then it would have been the province of the jury to say what the defendant meant by the use of the words and whether they were designed to apply to the plaintiff, and to charge him with the crime of perjury. This is the only kind of inference juries have any right to draw, and they must be from the evidence before them, and not from their own imaginations. The distinction between the case supposed and the one actually before us is very broad and clear, and seems reasonable and proper, and if adhered to will clear this case from all doubt or perplexity.

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IV. The verdict should be set aside, and a new trial granted. The plaintiff, however, should pay the costs of this appeal, and in case the court allow him to amend his complaint, he should pay the costs of the former trial also, for not availing himself of the permission to amend his complaint in the court below, which would have saved the necessity of this appeal.

*By the Court*, JAMES C. SMITH, J. If words are spoken of a person, charging him in express terms, with the crime of perjury, they are actionable without proof of any extrinsic facts to show their meaning. Such words necessarily import that the person charged has sworn falsely, upon a material point, in a judicial proceeding before a court or officer of competent jurisdiction. So, if the words uttered, although not charging perjury in express terms, necessarily imply that offense. (3 Cai. 73. 5 Cowen, 513. 8 Wend. 573.) In like manner, if the words used to express the charge, are such, in the sense in which they would naturally be understood, as to convey to the minds of those to whom they are addressed, the impression that the plaintiff had committed perjury, and that the defendant intended to be so understood by those who heard him, such words will of themselves, warrant a verdict for the plaintiff, in case the jury find that they were uttered with the intention above stated and were so understood. (*Power v. Price*, 16 Wend. 450.) In neither of the cases above supposed, is it necessary to give any other evidence of the fact that a suit was pending, or that the plaintiff was sworn, than is contained in the words themselves. (*Jacobs v. Fyler*, 3 Hill, 572. *Opinion of Beardsley, J. in Emery v. Miller*, 1 Denio, 208.)

In the present case the plaintiff testified respecting the words, and the occasion when they were spoken, as follows:

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"I met defendant and demanded of him a bed that he refused to give up. I told him I should sue him for it," and said, "I should not think you would want another law suit, for you have lost the one you have just had." Then he said, "Yes, your false swearing at that trial." "I then told him he had better not accuse me again of swearing false." Then he said, "Any man who professed to be a Christian, as you do, and went into the box and swore false as you did at that trial, had better join the church once more," or "a few times more." After that he repeated five or six times in the same conversation that I had sworn false in the suit. Once he said "that the folks who belonged to the church, and built tall steeples, thought they could swear false, or do any thing they had a mind to."

Here, as was said in *Jacobs v. Fyler*, the slander admits, that a suit was pending; and it is to be intended that what the plaintiff swore to was material. The defendant's counsel urges that there is no evidence that the suit was in a court of competent jurisdiction, or that the plaintiff swore falsely with a corrupt intent. Upon those points, however, the words themselves are sufficient to warrant a finding in favor of the plaintiff, under the rules above stated. The cause was submitted to the jury in accordance with these views.

No question arises upon the bill of exceptions, as to the sufficiency of the complaint. The testimony was received without objection, and the defendant's counsel did not suggest that the complaint was insufficient, until after the plaintiff had proved his case and rested. The defendant's counsel might then have raised the question as to the sufficiency of the complaint, by a motion to strike out so much of the testimony as tended to prove matters not alleged in the complaint, but he omitted to do so. The supposed defects in the complaint were stated as a ground

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for the motion for a nonsuit, but as the testimony given without objection was sufficient to establish a cause of action, that motion was properly denied.

The plaintiff is entitled to judgment on the verdict.

Judgment for the plaintiff.

[MONROE GENERAL TERM, December 2, 1867. *J. C. Smith, E. D. Smith and Johnson*, Justices.]

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HERRINGTON vs. THE VILLAGE OF CORNING.

It results from the several provisions of the general statute of 1847, authorizing the incorporation of villages, (*Laws of 1847, p. 582, ch. 426.*) that a village incorporated thereunder has no power to cause sidewalks to be made or constructed except in the mode, and by means of the agencies, therein provided; that the trustees have no authority to construct or repair sidewalks, until the electors, by resolution duly adopted, direct them to cause the work to be done, and also direct them to cause money to be raised by tax for the necessary advances for such work; that the powers of the electors over the subject are limited; and that within the limits prescribed, their powers are wholly discretionary.

Until the electors have directed the work to be done and the money to be raised, and the money has been raised, there is no fixed and absolute duty on the part of the trustees to cause the work to be done.

It was not the intention of the statute to confer upon the corporations formed under it, or upon their officers, an absolute power to make, or cause to be made and kept in repair sidewalks along their streets, thus involving taxation to an unknown extent; but the subject is referred to the discretion of the electors in their collective capacity, who by their action may impose upon the trustees the duty of causing any particular sidewalk to be made or repaired.

The policy of the statute is to protect the rights of individual lot owners against an undue wielding of corporate or official power; and if, in consequence of its operation, useful repairs or constructions are sometimes delayed or prevented, whereby an individual sustains peculiar damage, he suffers no legal injury, and the law gives him no remedy.

The peculiar provisions of the act of 1847, prescribing the only means by which the corporate power to make or repair sidewalks can be exercised, and limiting the authority of the trustees, and of the electors themselves, on that subject, leave no room to imply a contract by the corporation to make sidewalks, or keep them in repair, otherwise than as the statute prescribes.



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Where an injury to the plaintiff resulted from the decayed condition of a sidewalk which the defendants, a village incorporated under the provisions of the act of 1847, had caused to be constructed several years before the injury, in front of a lot owned by a non-resident; it not appearing that prior to the injury any resolution had been adopted at a meeting of the electors, directing the trustees to cause that particular sidewalk to be repaired, or providing that money be raised by tax for the necessary advances therefor; *it was held*, that no action could be maintained against the village corporation, for such injury.

*Held, also*, that a resolution adopted by the electors of the village, prior to the injury, authorizing the trustees to cause sidewalks to be built and kept in repair by the owners of lots "on each and every street of the village, when in their judgment the good and welfare of the inhabitants" should require it, "without any further vote of the people," did not aid the plaintiff's case; it being of questionable authority as not specifying any sidewalk to be constructed or repaired, and if valid it was not mandatory in respect to any particular sidewalk, but conferring a general and purely discretionary power as to what sidewalks, if any, should be made or repaired, and as to the time when the work should be done.

Section 18 of chapter 559 of the Laws of 1864, amending the general statute of 1847, so far as it relates to a fund for sidewalks, refers to such sidewalks only as are directed to be made or repaired pursuant to the provisions of section 15, of the same act, to wit, after a vote by ballot, for the purpose, by a majority of the taxable voters of the village, does not apply to a case where there is no evidence that such a vote has been taken.

A village corporation is not liable for personal injuries resulting from the decayed condition of a sidewalk, on the ground that, having constructed the sidewalk originally, it is bound to keep it in repair.

**T**HIS was an action to recover damages for an injury sustained by the plaintiff in consequence of a defective sidewalk in the village of Corning.

The defendant was incorporated prior to 1858, pursuant to the general act of December 7, 1847, "to provide for the incorporation of villages." (*Laws of 1847, ch. 426.*)

On 4th September, 1864, the plaintiff stepped into a hole in the sidewalk on the north side of market street, in the village of Corning, in front of lot 45, and injured his knee. The hole was caused by some of the planks constituting the walk having become displaced by use or decay. In 1858 the defendants constructed a good sidewalk in a proper manner on that side of that street in place of one previously

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there, which had become out of repair, the prior one not having been made by the defendants. The plaintiff was, and had been for twenty years, a resident and elector of said village, and in the habit of passing daily along that street. No funds were provided for the reconstruction or repair of the sidewalk in question, prior to the time of the injury, nor had any resolution been adopted by the electors of the village, directing the trustees to remake or repair that walk. The electors had, prior to the construction of the sidewalk, in 1858, passed a general resolution at a meeting in March, 1858, by its terms authorizing the trustees "to cause sidewalks to be built and kept in repair by the owners of lots," &c. And at a meeting of the trustees in July, 1858, a resolution was adopted to the effect, that the trustees should cause the owners of the lots to make and repair sidewalks. The lot in front of which the defendant was injured, belonged to Joseph Fellows, who did not reside in the village at the time of the injury. The three lots next west of this lot were owned by residents. These parties and Joseph Fellows relaid the walks in front of these lots in 1865.

There was no evidence or pretense that the defendants produced the defect in the walk, but the plaintiff charged non-feasance on the part of the defendants, merely.

On the trial, at the circuit, when the plaintiff rested his case, the defendants' counsel moved the court, that the plaintiff be nonsuited, on the grounds:

"1. That the statute does not impose upon the defendants an imperative or ministerial duty, to make or repair sidewalks, but that the power conferred by statute on the defendants in that respect is discretionary or judicial in its character. The defendants, therefore, are not liable for a mere omission to repair the sidewalk in question.

2. That there is no proof of any act on the part of the defendants, producing the defect complained of in the sidewalk in question.

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3. That it not only does not appear that any funds were raised, or provision made for the repair of the sidewalk in question, or any action by the electors to afford authority to the trustees to repair the same, but it does appear that no funds were raised or provision made for such purpose.

4. That the duty in respect to sidewalks conferred on the defendants by statute, is to the public, and for omission to exercise it, the defendants are not liable to individuals, but to the public only.

5. That the plaintiff being one of the electors of the village of Corning, and as such chargeable with knowledge of the condition of the sidewalk, his negligence must be deemed to have contributed to the injury complained of. And he, as such elector, must also be deemed chargeable with the omission of the defendants to cause the repair of the sidewalk in question."

The court granted the motion and nonsuited the plaintiff. To which ruling and decision the plaintiff's counsel duly excepted. Whereupon the court made an order directing that the plaintiff have sixty days to make and serve exceptions, and the defendants the same time to serve amendments thereto, and that said exceptions be heard in the first instance at general term.

*Brown & Graves*, for the plaintiff. I. The duty is imposed upon the defendants as a municipal corporation, to build and keep in repair the streets and sidewalks within said village. That duty is imperative: "For when a public body is clothed by statute, with power to do an act which concerns the public interests, the execution of the power may be insisted on as a duty, though the statute conferring it be only permissive in terms." (*Hutson v. The Mayor, &c. of N. Y.* 9 *N. Y. Rep.* 168. *Mayor, &c. of New York v. Furze*, 3 *Hill*, 612. *Adsit et al. v. Brady*, 4 *id.* 630. 1 *Denio*, 601. *Storrs v. City of Utica*, 17 *N. Y. Rep.* 104.) 1. The defendants, by accepting their charter,

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became bound, by the conditions thereof, to keep the sidewalks on the public streets within the village of Corning in repair, and as a consideration for this, received certain grants, privileges and franchises. (*See Charter Village of Corning; Laws of 1847 and amendments thereto; Laws of 1851, 1852, 1855, 1857, 1860, 1861, 1862 and 1864.*)

2. Having accepted, acted under, and enjoyed the benefits of their charter, the defendants are bound by its conditions, and if they fail to perform them, are liable for such special damage as any person may sustain by reason thereof. (*Hutson v. The Mayor, &c. of New York, 9 N. Y. Rep. 168. The Mayor, &c. of New York v. Furze, 3 Hill, 612. People v. Corporation of Albany, 11 Wend. 539. Hecock v. Sherman, 14 id. 58. Mayor, &c. of New York v. Bailey, 2 Denio, 433.*)

3. It is the duty of the trustees, as public officers, to keep and maintain the sidewalk in repair; for this purpose they are empowered to raise sufficient funds. (*See cases above cited; also Mayor, &c. of Albany v. Cunliff, 2 N. Y. Rep. 165; Rochester Lead Co. v. City of Rochester, 3 id. 463; Dygert v. Schenck, 23 Wend. 446; Pierce v. Dart, 7 Cowen, 609.*)

4. "The board of trustees have power, and it shall be their duty to direct the manner of making and repairing sidewalks," &c. (*3 General Statutes, p. 800, § 57, subd. 22.*)

5. "It shall be the duty of the trustees to carry into effect every resolution adopted at any meeting of the electors of such village, which such meeting shall have authority to adopt." (*3 General Statutes, p. 800, § 57, subd. 10.*)

6. The electors of the village of Corning on the 2d day of March, 1858, passed a resolution authorizing the trustees of the village of Corning to cause sidewalks to be built and kept in repair by the owners of lots on each and every street in said village, when, in their judgment the good and welfare of the inhabitants should require it, without any farther vote of the people.

7. If the owner of the lot (in front of which the sidewalk is to be made or repaired) be not a resident of said village,

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the trustees *shall cause* the same to be built or repaired. And in such case they are required to keep an account of the expenses thereof, which shall be a tax against him and a lien upon such lot. (*See General Statutes, p. 798, § 47.*) 8. The lot in front of which the plaintiff was injured was owned by Joseph Fellows, who was not a resident of said village.

II. The defective sidewalk in question was originally built by the defendants. Therefore, if the defendants are not liable for a refusal or omission to construct a sidewalk, yet, having made it as an improvement or public work, as they are authorized to do, the duty is imperative to preserve and keep it in proper repair. (*Barton v. The City of Syracuse, 36 N. Y. Rep. 54. Mills et al. v. City of Brooklyn, 32 id. 489. Hutson v. Mayor, &c. of New York, 9 id. 163-70. Conrad v. Trustees of Ithaca, 16 id. 158. Rochester White Lead Co. v. City of Rochester, 3 id. 463. Mayor, &c. of New York v. Furze, 3 Hill, 612. Barton v. City of Syracuse, 37 Barb. 292. Wilson v. Mayor, &c. of New York, 1 Denio, 595.*) 1. In the construction of sidewalks and keeping them in repair, municipal corporations act *ministerially*, and are bound to exercise needful diligence, prudence and care. (*Barton v. City of Syracuse, 36 N. Y. Rep. 54; 37 Barb. 292. People v. Corporation of Albany, 11 Wend. 539. Mayor, &c. of New York v. Furze, 3 Hill, 612.*) 2. Where the trustees of a village are declared commissioners of highways therein, they are not, as such, independent officers, but agents of the corporation, and are liable for their acts and omissions, according to the law of master and servant. (*Conrad v. Trustees of Ithaca, 16 N. Y. Rep. 158. Hutson v. The City of New York, 5 Sandf. 289.*) 3. It does not remove the defendants' liability that they may by ordinance impose the duty of repairing sidewalks upon adjoining owners. (*9 Abb. 40. 2 Hill, 466. 16 Abb. 341. 3 Barb. 329.*)

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III. The defendants were provided with abundant resources and remedies to supply themselves with funds:

1. "If the owner be a non-resident, the trustees shall cause the sidewalk to be made or repaired; keep an account of the expenses thereof, which shall be a tax against him and a lien on the lot." (*See 3 General Statutes, p. 798, § 47.*)
2. The land may be leased for non-payment of the expenses incurred by the trustees in making or repairing sidewalks. (*3 General Statutes, p. 799, § 50.*)
3. The real estate may be sold by the trustees for the expenses in making or repairing sidewalks. (*Session Laws, 1864, ch. 559, § 1.*)
4. "The trustees shall have power to raise by tax a fund for advances, that may be required for sidewalks, &c. which funds shall be raised as other taxes in said village." (*Session Laws, 1864, ch. 559, § 18.*)
5. Therefore, a lack of funds is no defense. (*Wendell v. Mayor, &c. of Troy, 39 Barb. 338. 5 Sandf. 289. 31 Barb. 143. 28 How. 211.*)

IV. The injury resulted from an omission of duty—the neglect to do an act incumbent upon the defendants to perform. Therefore, no notice to the defendants of needed repairs was necessary. (*Barton v. City of Syracuse, 36 N. Y. Rep. 58. 5 Duer, 674.*) Notice may be inferred from lapse of time. (*Davenport v. Ruckman, 16 Abb. 341. Barton v. City of Syracuse, 37 Barb. 293–300.*)

V. From the foregoing authorities it is apparent that the duty of keeping in repair the sidewalks already built by the defendants, was an imperative duty upon them, and as they had by statute the power to supply themselves with funds for that purpose, there is no excuse for not doing so. The judgment of nonsuit should be reversed, and a new trial granted.

*Geo. B. Bradley*, for the defendant. I. The defendants being a municipal corporation with its powers and duties defined and specified, its trustees can execute no powers except those conferred, and have no duties to perform ex-

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cept those imposed by statute. 1. By reference to the statute it will be seen, that while the duty is imposed upon the trustees to make and repair crosswalks, they are not required to construct and repair sidewalks. In the latter case the powers conferred on the defendant are in their nature judicial or discretionary, and depend upon the refusal or neglect of the owners of the lots to do it. The statute provides that at a meeting of the electors, those entitled to vote, "may by resolution direct the trustees to cause to be raised by general tax for the purpose of constructing and repairing crosswalks." (*Laws 1847, ch. 426, § 28, sub. 8.*) And for the necessary advances for making and repairing sidewalks, in cases where those required to make or repair them shall neglect or refuse to do so. (§ 28, *sub. 7.*) Until funds are thus raised, the trustees have no power to make or repair sidewalks. The statute has practically prohibited it, by providing that the "village shall have no power to borrow money, nor shall it be liable to pay money borrowed on its account or advanced in its behalf, by its officers or by any other person, nor shall any of its money or property be applied to any such purpose. Nor shall such village incur any debt or liability beyond the amount of the taxes applicable to the payment of such debts or liabilities which shall have been voted to be raised in such village according to law." (*Laws 1847, ch. 426, § 43.*) And "no officer shall have power to assent to incurring any debt or liability," &c. (§ 44.) Then before any tax can be voted to be raised at any meeting of electors for any purpose, "a three weeks' notice of the holding of such meeting shall be given, (§ 11,) which shall specify the amounts and objects of such tax, and the specific sum required to be raised for each object, and shall state that such meeting will be called upon to vote in that respect," &c. (§ 29.) And "every resolution adopted at any such meeting, directing any tax to be raised, shall distinctly specify the object for which such tax shall be directed to be

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raised, and the sum to be applied to each object, otherwise the resolution shall be void." (§ 30.) Then the trustees have no authority to cause sidewalks to be made or repaired, until directed by a resolution passed by vote of electors pursuant to statute which provides that the electors at a meeting, "may by resolution direct the trustees to cause sidewalks to be made or repaired." (§ 45.) "But no such resolution shall be adopted unless the requisite (three weeks) notice of such meeting shall state that such resolution will be proposed at the meeting." (§ 45.) And the resolution, as well as the notice, must particularly specify the place in the village where the trustees may cause the sidewalk to be made or repaired. (§ 45.) Then following this action of the electors, the trustees have no power to cause the sidewalk referred to in the resolution to be made or repaired, until the owner of the lot, if a resident of the village, has neglected or refused, after sixty days notice. That notice to the owner is unnecessary if he be a non-resident. (§§ 46, 47.) By these provisions of the statute, and others in the general act referred to, it appears that the owners of the lots along the streets are primarily entitled, and it is their duty to construct and repair sidewalks along their respective lots, and that the defendants have only a power or authority to be exercised in a certain event, which must from its very nature, as conferred, be only judicial or discretionary. (*Cole v. The Trustees of Medina*, 27 Barb. 218. *Peck v. The Village of Batavia*, 32 *id.* 634; approved in *Mills v. The City of Brooklyn*, 32 *N. Y. Rep.* 497, 498.) It will be seen by the two cases first above cited, that the statutory authority, or power of the villages of Medina and Batavia, approached nearer a duty, than the powers conferred by the provisions of the general act under which the defendants were incorporated. 2. The liability of a municipal corporation for mere non-feasance depends entirely upon the statute. The acceptance of the charter fastens upon the corporation all the duties imperative in



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their character, which the legislature have imposed, and a liability growing out of any omission to perform them. (*See cases above cited.*) The cases of *Conrad v. The Trustees in of Ithaca*, (16 N. Y. Rep. 158,) and *Weet v. Trustees of Brockport*, (*added as note, page 61,*) determined the liability cases of negligent execution of duty. And the case of *Hickok v. Trustees of Plattsburgh*, unreported, referred to page 161, held there was a liability for omission to perform the duty imposed. None of these cases have any material application to this case. They are referred to by the court in *Peck v. The Village of Batavia*, (*supra.*) And it is not important for the purposes of this case, whether the liability of a municipal corporation is based upon a breach of contract, as argued by the justice in the case of *Weet v. The Trustees of Brockport*, or neglect of a duty imposed, as recognized in other cases; for in either case to create liability for an omission merely, the statute must impose a well defined and unrestrained duty on the corporation. 3. The statute not only fails to impose any such duty upon the defendants in respect to sidewalks, but restrains the exercise of authority in that respect, so that the defendants are not at liberty to construct or repair them, until certain action has been taken at a meeting of the electors duly notified, after the necessity of such construction or repair has been produced, and after the owner has neglected or refused to construct or repair. There is no authority to keep in repair, because there is no authority to act in the premises, until after repair is necessary. And the same with respect to construction. And then from the very nature of the authority conferred, and the manner provided for its exercise, it must be discretionary. It cannot be claimed that if a plank were displaced in the walk, it would be the imperative duty of the defendants to call a meeting and give the requisite notices and raise funds to replace the plank. And until then the defendants would possess no power to make the repair, or to obtain funds for that purpose.

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II. The fact that a resolution was adopted by the electors in March, 1858, to authorize the trustees to construct and repair sidewalks, in no manner aids the plaintiff. 1. The electors had no authority to adopt any such resolution, and no funds were authorized to be raised, under or by it. The resolution must specify particularly the sidewalk to be made or repaired, (§ 45,) with view to raising funds by resolution, to be passed in like manner, (§ 28, *sub.* 7, §§ 29, 30.) The statute does not permit general authority to be conferred on the trustees, in this respect. 2. After the adoption by the electors of this resolution, the trustees constructed the sidewalk in question, and fully exercised and exhausted any authority which they previously had in respect to that walk. 3. But it is of no importance what the effect of the resolution was, in respect to the authority of the trustees to construct or repair the walk. It clearly could not create such duty on the part of the defendants as to make it chargeable for an omission to exercise it. No action of the defendants through their electors or trustees can create a duty to charge itself for neglect to perform it. It is sufficient that no imperative duty is imposed by the statute. The part exercise of a discretionary power does not convert it into a statutory duty.

III. The question of unskillful execution of authority is not in this case; so many of the cases upon that subject have no application. The defendants, in 1858, properly constructed the sidewalk in place of one which had been there. It cannot now be insisted that every power conferred is an imperative duty, although some *dicta* of the court in the *Mayor v. Furze*, (3 *Hill*, 612,) appear to that effect, since they have been entirely disproved in *Wilson v. Mayor*, *fcc.* (1 *Denio*, 600, 601;) *Mills v. Brooklyn*, (32 *N. Y. Rep.* 499.) And a plain distinction is observed between duties imperative, and powers discretionary or judicial in character. (*Kavanagh v. Brooklyn*, 38 *Barb.* 237. *Wilson v. Mayor*, *fcc.* 1 *Denio*, 595. *Mills v. Brooklyn*, 32 *N. Y. Rep.*

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498, and other cases above cited.) And in all cases of duty to the public, except in case of corporations existing and acting under a charter imposing an imperative duty, there is no liability to an individual for injuries occasioned by omission to perform such duty. (*Garlinghouse v. Jacobs*, 29 N. Y. Rep. 297, overruling *Adsit v. Brady*, 4 Hill, 630.) The liability therefore depends upon the statute. An authority created by the action of the defendants, even though it be a duty, falls within the principle of the case last cited.

IV. It will be seen that there is a distinction observed by the statute, between the duties and powers of the defendants in respect to streets and crosswalks on the one hand and sidewalks on the other. In respect to the former, the powers of the defendants are ample, and they are charged, primarily, with the duty of taking care of them, while the authority respecting sidewalks is both limited and secondary. And any individual injury occasioned by mere omission to exercise the latter authority must be *damnum absque injuria*.

*By the Court*, JAMES C. SMITH, J. The defendants are a municipal corporation created under the general act for the incorporation of villages, passed in 1847. (*Laws of 1847*, p. 533, ch. 426.) The plaintiff sues for personal injuries sustained, as he alleges, in consequence of an omission of duty on the part of the defendants to keep in repair a certain sidewalk within its corporate limits. In order to recover, he must show that the alleged duty was absolute and imperative. To decide this point, it is necessary to examine such provisions of the statute under which the defendants were incorporated as relate to the powers of the corporation, or its agents, in respect to the constructing and repairing of sidewalks.

The corporation has a board of trustees, five in number. (§ 25.) The trustees are charged with certain absolute

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duties specified in the act, but the duty of making or repairing sidewalks is not among them. (§ 57.) The only specific duty absolutely imposed upon the trustees in respect to sidewalks, is to direct the manner of making and repairing sidewalks and crosswalks, and when there are no street commissioners, to superintend making and repairing the same. (*Subd. 22.*)

There are also certain enumerated powers vested in the trustees, to be exercised by them in their discretion, (§ 58,) but the power in question is not among them.

On a further examination of the statute it will be seen that the trustees have no absolute power to cause sidewalks to be made or repaired, but that their authority respecting that subject is wholly dependent on the action of the electors of the village.

The act provides that the duly qualified voters of the village, at any meeting, may, by resolution, direct the trustees to cause sidewalks to be made or repaired on any public road therein, or on any part of such road therein, specified in the resolution. (§ 35.) The expense of making or repairing such sidewalk shall be a lien on the lot which it adjoins in front; and if the owner be a resident, the trustees shall give him notice of the manner in which such sidewalk is required by them to be made or repaired, and of the time, not less than sixty days, within which it may be so made or repaired by him at his own expense, under the superintendence of the trustees or of the street commissioners. (§ 46.) If the owner shall not make or repair such sidewalk, &c. or if he be not a resident of the village, the trustees shall cause the same to be made or repaired, and the expenses thereof shall be a tax against him and a lien upon the lot, and the trustees shall issue their warrant for the collection thereof. (§ 47.) If the warrant shall be returned uncollected, the trustees may lease the real estate on which the tax is assessed, or the expenses are a lien, for the purpose of raising the amount,

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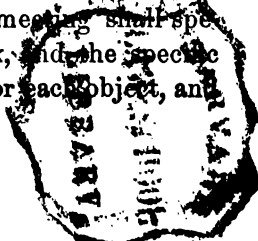
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(§§ 50-54,) and by an act passed in 1864, they may sell such real estate for the like purpose. (*Laws of 1864, p. 1295, ch. 559, §§ 1-8.*)

But the duty of causing such sidewalk to be made or repaired in case of the neglect or non-residence of the owner, with which the trustees are charged by the provisions above referred to, is not fixed and absolute, nor does it become so, until the trustees are supplied with funds for the purpose. They have no power, within themselves, to raise such funds, and in that respect also they are wholly dependent on the action of the electors. It is expressly provided by the act that the village shall have no power to borrow money, nor shall it be liable to pay money borrowed on its account, or advanced in its behalf, by its officers or by any other person, (§ 43,) and no officer of the village shall have power to assent to incurring any debt or liability on the part of the village contrary to the provisions of the act. (§ 44.) But it is also provided that at any meeting of the electors to elect village officers, or at any other meeting duly notified, the qualified voters may, by resolution, direct the trustees to cause to be raised by a general tax upon the taxable property of the village, taxes for certain specified purposes, and no other, one of which is, "for the necessary advances for making and repairing sidewalks in cases where those required to make or repair them shall neglect or refuse to do so." (§ 28, *subd. 7.*)

Even the powers of the electors, in respect to the subjects above referred to, are expressly limited by the terms of the act. No resolution shall be adopted requiring the trustees to cause a sidewalk to be made or repaired, unless the notice of the meeting required by law to be given by the trustees shall specify that such a resolution will be proposed for adoption thereat. (§ 45.) And no tax shall be voted, unless the notice of the meeting shall specify the amount and objects of such tax, and the specific sum required or proposed to be raised for each object, and



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shall state that such meeting will be called upon to vote in respect to raising the sum so specified. (§ 29, *see also* §§ 30, 31.)

Thus it appears from these several provisions of the act, that the corporation has no power to cause sidewalks to be made or constructed, except in the mode, and by means of the agencies therein provided; that the trustees have no authority to construct or repair sidewalks until the electors by resolution, duly adopted, direct them to cause the work to be done, and also direct them to cause money to be raised by tax for the necessary advances for such work; that the powers of the electors over the subject are limited, and that within the limits prescribed, their powers are wholly discretionary.

Until the electors have directed the work to be done and the money to be raised, and the money has been raised, there is no fixed and absolute duty on the part of the trustees to cause the work to be done.

In short, it is not the intent of the general statute referred to, authorizing the incorporation of villages, to confer upon the corporations formed under it, or upon their officers, an absolute power to make or cause to be made and kept in repair sidewalks along their streets, thus involving taxation to an unknown extent, but the subject is referred to the discretion of the electors in their collective capacity, who by their action may impose upon the trustees the duty of causing any particular sidewalk to be made or repaired. This policy of the statute is obviously intended to protect the rights of individual lot owners against an undue wielding of corporate or official power, and it should be carefully observed. If in consequence of its operation useful repairs or constructions are sometimes delayed or prevented, whereby an individual sustains peculiar damage, he suffers no legal injury, and the law gives him no remedy.

This view of the statute, and of the powers and duties

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resulting from it, distinguishes the present case from that of *Conrad v. The Trustees of the Village of Ithaca*, (16 N. Y. Rep. 158,) and others of a like nature to which we are referred by the plaintiff's counsel. Those cases rest upon the principle that the grant by the government to a municipality, of a portion of its sovereign power, is to be deemed a sufficient consideration for an implied contract on the part of the corporation to perform the duties which the charter imposes, and the contract made with the sovereign power enures to the benefit of every individual interested in its performance. The peculiar provisions of the statute, already referred to, prescribing the only means by which the corporate power to make or repair sidewalks can be exercised, and limiting the authority of the trustees and of the electors themselves, on that subject, leave no room to imply a contract by the corporation to make sidewalks or keep them in repair, otherwise than as the statute provides.

If the views above expressed are correct, the plaintiff's action cannot be supported. The injury complained of resulted from the decayed condition of a sidewalk, which the defendants caused to be constructed several years before the injury, in front of a lot owned by a non-resident. It does not appear, that prior to the injury any resolution had been adopted at a meeting of the electors, directing the trustees to cause that particular sidewalk to be repaired, or providing that money be raised by tax for the necessary advances therefor.

The plaintiff proved that a resolution was adopted by the electors of the village, on the 2d March, 1858, authorizing the trustees to cause sidewalks to be built and kept in repair by the owners of lots, "on each and every street of the village, when, in their judgment, the good and welfare of the inhabitants shall require it, without any further vote of the people." This resolution does not

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aid the plaintiff's case. In the first place, it is, to say the least, of questionable authority, as it does not specify any sidewalk to be constructed or repaired. Section 45 of the general act requires that every resolution of the electors, directing the trustees to cause sidewalks to be made or repaired on any public road, or any part of such road, shall specify such road or part of road. But, in the next place, if the resolution is valid, it is not mandatory in respect to any particular sidewalk, but confers a general and purely discretionary power as to what walks, if any, shall be made or repaired, and as to the time when the work shall be done.

The plaintiff's counsel refers to certain provisions of chapter 559 of the laws of 1865, amending the general statute, but they do not affect this case. Section 18 of that act, which gives the trustees power to raise, by tax, funds for certain purposes therein mentioned, including advances required for sidewalks, expressly directs, that said "funds shall be raised in the same manner in which other taxes are raised in said village." This seems to require the preliminary resolution of the electors, provided for by the general act. But, however that may be, (a point which it is unnecessary to decide,) the section, so far as it relates to a fund for sidewalks, refers to such sidewalks only as are directed to be made or repaired, pursuant to the provisions of section 15 of the same act, to wit, after a vote by ballot, for the purpose, by a majority of the taxable voters of the village who shall own real estate therein, (provided such vote shall represent two thirds of the real estate of said village, held by resident owners.) There is no evidence of such a vote in the present case.

The act of 1847 provides that it shall be the duty of the trustees to carry into effect every resolution adopted at any meeting of the electors of such village, legally con-



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vened, which such meeting shall have authority to adopt. (§ 57, *subd.* 10.) In view of this provision, I see no reason to doubt that if the electors had, by resolution duly adopted, directed the trustees to repair the sidewalk in question, and directed, also, the raising of funds for that purpose by tax, and such funds had been raised, the duty of the trustees to repair would have become absolute and fixed, and, for their neglect of such duty, the corporation would have been liable to an individual sustaining peculiar damage thereby. (17 *John.* 451. 29 *N. Y. Rep.* 297. 34 *id.* 389.) But, as we have seen, that is not the case before us.

The plaintiff's counsel argues that the defendants are liable, on the ground that, having constructed the sidewalk originally, they are bound to keep it in repair. But the argument overlooks entirely the provisions of the statute already adverted to, which relate to repairs as well as to original constructions. There is no imperative obligation to repair without funds for that purpose. In the case of *Peck v. Batavia*, (32 *Barb.* 634,) the injury resulted from the fact that a sidewalk, originally constructed by the village corporation, was out of repair, yet it was held that the corporation was not liable.

The defendants are entitled to judgment on the nonsuit ordered.

Judgment for the defendants.

[MONROE GENERAL TERM, March 2, 1868. *E. D. Smith, Johnson* and *J. C. Smith*, Justices.]

IRELAND and others *vs.* THE CITY OF ROCHESTER.

The charter of the city of Rochester required that before the common council should determine to open, widen or improve any street, &c. the expense of which, in whole or in part, was to be defrayed by a local assessment, they should cause an estimate thereof to be made, and should, by an entry in their minutes, describe the portion or part of the city which they deemed proper to be assessed for such expense. And that they should cause a notice to be published, for a specified time, in a daily newspaper, specifying such improvement, the estimated expense thereof, and the portion or part of the city to be assessed for such expense; and requiring all persons interested, to attend the common council at the time appointed in such notice. That *at the time appointed in such notice* the common council should proceed to hear the allegations of the owners and occupants of houses and lots situated within the portion of the city so described, and after hearing the same, should make such further order in respect to such improvement as they should deem proper. Such a notice having been published, in respect to proposed improvements in an avenue, the common council, at the time appointed, viz. on the 11th of July, 1865, met, and without taking any final action, adjourned from time to time till the 22d of August, 1865, when they proceeded to hear allegations in relation to the proposed improvements, and adopted an ordinance for making such improvements.

*Held* that the original notice being regular, and the board having met at the time therein appointed, they had jurisdiction of the proceeding, and could then hear allegations, if they were to be made, or could *adjourn*, in their discretion, to any other time specified; in which latter case, the proceedings would be carried over to the adjourned day, to be then taken up at the stage at which they were left at the preceding meeting. That these proceedings of the board were therefore regular; it not appearing that any person who attended the first or any subsequent meeting, to make allegations, was denied an opportunity of making them, or was not heard.

By an amendment of section 164 of the charter of the city of Rochester, adopted in 1865 it is provided that no contract shall be let for making any public improvement, at a price greater than the estimate thereof. *Held* that the amendment means, simply, that in contracting for making a public improvement, the work *included in the estimate* shall not be let at a higher price than that specified in the estimate. That it does not prohibit the common council from causing other work to be done, in addition to that included in the estimate, if they find it necessary, in order to complete the improvement. Such amendment is not inconsistent with section 207 of the charter, which provides that if a greater sum of money is expended in the improvement than was estimated, the common council may direct an assessment to collect the same.

If the excess of expenditure for a given improvement is not for work included in the estimate, but is for work not embraced in the ordinance, the common

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council has authority, under section 207, to direct an assessment of money to meet such excess.

The common council having authority to make an expenditure, for an improvement in excess of the estimate, in their discretion, and to levy an assessment to meet it, and having passed a resolution for that purpose, which recites the fact that an expenditure has been made, in such improvement, of a specified sum in excess of the estimate, the resolution itself, if valid, is at least *prima facie* evidence of such expenditure.

Section 207 of said charter, provides that "if it shall appear that a greater sum of money has been expended in the completion of such improvements, than was estimated \* \* the common council may direct the assessment of the same on the owners and occupants of houses and lands benefited by such improvements, in the same manner as herein directed, and the same proceedings in all respects shall be had thereon, *and the common council may enlarge the territory to be assessed for such improvements.*" If the common council, assuming to act under the authority of this section, pass a resolution enlarging the territory to be assessed for the excess of the expense of the improvement of an avenue, beyond the original estimate, without notice to the owners of the lots to be assessed in the enlarged territory, and without giving them an opportunity to be heard upon the question whether they are benefited by the improvement and should be taxed to defray the expense of it, such resolution is a nullity, as to such owners. This is so without reference to the question whether the charter requires notice to be given. It is in the nature of a judicial proceeding against such owners, and its effect is to take their property for public use.

The common council do not acquire jurisdiction as to the owners and occupants of lots in the enlarged territory, by virtue of the original proceeding to which they were not parties. The proceeding is commenced, as to them, by the attempt to enlarge the territory.

The statute in question, conferring upon the common council this extended authority over local assessments, is a legitimate exercise of the taxing power, if it provides for notice to those assessed; but not otherwise.

The want of notice is not cured by the provisions of sections 207 and 208 of the city charter declaring the proceedings valid notwithstanding any "irregularity, omission or error." These provisions do not extend to jurisdictional defects.

The common council cannot direct an assessment for a deficiency, without notice to those on whom such assessment will fall, even though they are occupants of the original territory, and as such had notice of the original proceeding.

Such notice, in proceedings for a re-assessment, need not be in the precise form prescribed by section 164 of the charter. It is enough that the notice specify the action proposed to be taken, and conform to the requirements of section 164, so far as they are applicable to the case.

In the proceedings for a re-assessment, no person can be heard upon any question which was finally decided in the original proceeding. The question

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whether the improvement should be made is of that nature. So, the owners and occupants of houses and lots in the original territory, who were duly notified, and were decided to be benefited by the improvement, and ordered to be assessed for it, cannot raise again the question as to their liability to be assessed. But the question whether the work has cost more than the estimate, is open to them, as well as to the occupants of the new territory proposed to be brought in; and the latter may also be heard in respect to the allegation that they are benefited by the improvement and ought to be assessed.

The whole policy of the charter of the city of Rochester so far as it can be gathered from the language employed, is opposed to the idea that the owners of lands may be assessed for local improvements without notice; whether the assessment is for the purpose of raising the original estimate, or meeting a deficiency; and whether the lands are within the original or the enlarged territory. *Per* J. C. SMITH, J.

The legislature have not expressed themselves in language which indicates an intention to exceed their constitutional powers; and such an intention is not to be implied, if a different construction can be fairly adopted. *Per* J. C. SMITH, J.

If an assessment is void as to persons whose property is assessed, their right to maintain an action to restrain the city from collecting it, is clear, not only to avoid a multiplicity of suits, but also to remove a cloud from their respective titles created by the lien of the assessment.

It is a plain principle of justice, applicable to all judicial proceedings, that no person shall be condemned, or shall suffer judgment against him, without an opportunity to be heard. *Per* J. C. SMITH, J.

An objection that all the persons united in interest are not made plaintiffs, must be set up in the pleadings, or it will be deemed waived.

THIS action was commenced May 28, 1867, by service of summons and complaint, and temporary injunction, granted by Hon. E. DARWIN SMITH, justice, restraining the defendants, and all persons acting under their authority, from collecting an assessment levied upon lots owned and occupied by the plaintiffs, (between eighty and ninety in number,) on South avenue, in the city of Rochester, for an alleged deficiency in a previous assessment on Mt. Hope avenue, for the construction of a sidewalk and other improvements connected therewith, on the avenue last named. The complaint alleges various departures from, and want of compliance, with the requisitions of the city charter; that there was no necessity for such additional

assessment; and that the action of the common council in the matter was a fraud upon their rights in the premises. The answer of the defendants admitted the assessment and the passage of the resolutions and ordinances set forth in the complaint, and insisted upon the regularity of the proceedings, the compliance with the city charter, the necessity for the assessment, and denied the injustice and fraud alleged in the complaint.

On the trial at the Monroe circuit, in December, 1867, the complaint was dismissed, at the close of the plaintiffs' testimony. Leave was given to the plaintiffs to make a case and exceptions, to be heard, in the first instance, at the general term, and, in the meantime, the injunction was continued, and the defendants' proceedings were stayed. The plaintiffs appealed from the judgment of dismissal.

*H. R. Selden*, for the appellants. I. There was no opportunity given to those about to be assessed for the improvement, to make allegations against the ordinance, as the city charter requires. (*City Charter*, § 164. *Laws of 1861*, p. 322, § 165.) It is obvious, from the answer, and from the proceedings, that the parties interested were not called upon by the common council, *at the time appointed*, as the charter requires, to make allegations against the ordinance. Not being *called upon*, they had no right to be heard, as it would have been a contempt for a mere citizen to interrupt the proceedings of the "conscript fathers." It is obvious, from section 164, (165 of the statute,) that the hearing of allegations and the action of the common council, were designed to be entirely separate and distinct acts, and that the disposition to be made of the ordinance should not be taken up until "after hearing the allegations." We insist that the "hearing of allegations" could only take place "at the time appointed in the notice;" that that part of the business could not be adjourned. And that after action upon the ordinance had been en-

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tered upon, and the vote upon its passage once taken, which could only be done "after hearing allegations," an adjournment of further action upon the ordinance cannot be construed as carrying with it an adjournment for the purpose of hearing allegations. At all events, if that part of the business was adjourned, especially after the ordinance had been taken up and acted on, the adjournment was ineffectual without a new notice, and no notice having been given, the persons interested were not called upon; indeed, had no right to appear at the adjourned day.

II. The resolution for the assessment of the \$3319.92 deficiency, upon the lots on Mount Hope avenue and South avenue, and the assessment in pursuance of it, were void. 1. The common council were prohibited by the charter from expending upon the improvement any sum beyond the original estimate of \$25,980. (*Charter*, § 164, *as amended*. *Laws of 1865*, p. 1092, § 15.) This amendment to section 165, prohibiting the expenditure of any sum beyond the amount of the original estimate, having been passed since the provisions of section 207, (*Laws of 1861*, p. 335, § 208,) authorizing further assessments for such excess of expenditures, were passed, and being irreconcilable with those provisions, of necessity repeals them. (*Harrington v. The Trustees of Rochester*, 10 *Wend.* 547.) 2. In fact, as the case shows, there has been no expenditure for *the work described in the original ordinance*, beyond the amount of the estimate, all of which was paid. That estimate was \$25,980.

The contracts were :

West side, 6,008 feet, at \$2.05, . . . . .	\$12,316 40
Crosswalks, 290 feet, at \$2.50, . . . . .	725 00
East side, 5,342 8-10 feet, at \$2, . . . . .	10,685 60
Crosswalks, 290 feet, at \$2.38 . . . . .	690 20
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	\$24,417 20
Excess of estimate, . . . . .	\$1,562 80

Those contracts "embrace all the improvements mentioned in said ordinance," and "said contractors fully completed all the work specified and embraced within said ordinance and the said contracts, according to the terms thereof. This position is not touched by the amendment of the case brought in as "errata." That amendment shows that "the *whole work* cost \$3319.92 more than the amount stated in the original ordinance," but the evidence had previously shown that all the work "embraced in the ordinance" had been performed for \$1562.80 *less than the estimate*. The amendment does not, in the least, contradict that evidence. 3. The excess of expenditure was caused, in part, by work not included in the ordinance, as the defendants' answer shows, to wit, "retaining walls on each side of the approaches to the bridge over the canal," and the residue of such excess must have been caused by work not embraced in the ordinance, although the case does not show *what the work was*. 4. The common council had no evidence of the expenditure of any sum beyond the estimate; nor have they offered any to the court. That was a jurisdictional fact, of which the recital in their resolution is not evidence. (*Charter*, § 207. *Laws of 1861*, p. 334, § 208.) "If it shall appear that a greater sum has been expended," &c. 5. No notice was given to the property owners on South avenue, to show cause why they should not be subjected to this assessment. This condemnation of the plaintiffs, *without hearing, and without notice*, is as inconsistent with the charter as it is with the plainest principles of justice. (*Charter*, §§ 163, 164, 207. *Laws of 1861*, pp. 322-334, §§ 164, 165. 208.) It will be seen by sections 163-4, above referred to, that no improvement, "the expense of which, in whole or in part, is to be defrayed by a local assessment," can be entered upon by the common council, without a petition requesting it, "signed by at least a majority of the owners of property to be assessed" there-

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for; or by a vote of three-fourths of all the aldermen, "after allegations have been heard." The people of South avenue have had no opportunity to be heard. They have had no opportunity to allege, either that the improvements should not be made, or, if made, that they should not be assessed for it, or if they were to be assessed, that others, equally benefited, should be assessed also. The whole spirit of the charter requires that before any one can be assessed for local improvements, he shall have an opportunity to be heard. That notice of some kind should be given in such cases, is perfectly clear, without reference to the city charter. (*Jordan v. Hyatt*, 3 Barb. 282-3. *Kinderhook v. Claw*, 15 John. 537. *Elmendorf v. Harris*, 23 Wend. 628. *Doubleday v. Newton*, 9 How. Pr. Rep. 71. 15 Wend. 574.) 6. The common council have not adjudged that the lots on South avenue are benefited by this improvement. They had previously declared, that the lots on Mount Hope avenue alone were benefited, and that declaration has never been rescinded or contradicted. The logic of the proceeding, therefore, is this: Whereas the lots on Mount Hope avenue alone are benefited by this improvement, therefore the lots on South avenue shall be assessed to pay the expense of it.

III. The assessment being void, and the defendants about to enforce its collection, it was proper for the plaintiffs to ask the aid of this court to restrain such collection. If the collection had been proceeded with, more than eighty suits would have been necessary to accomplish what can be better accomplished by this suit alone. 1. Avoiding multiplicity of suits is good ground for equity jurisdiction. (*Heywood v. City of Buffalo*, 14 N. Y. Rep. 534.) 2. By the provisions of the charter, section 208, (209,) as amended in Laws of 1862, page 295, the *assessment itself* is made a lien, without reference to the prior proceedings, and this suit is proper, therefore, to remove clouds from the plaintiffs' title. (*Heywood v. City of Buffalo*,



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*supra*.) 3. No objection to the jurisdiction of the court of equity having been taken in the answer, none can be taken now. (*Grandin v. Le Roy*, 2 Paige, 509. *Bank of Utica v. City of Utica*, 4 *id.* 400.) This objection when valid, as the cases above cited show, constitutes a good ground of demurrer for defect of jurisdiction: it was, therefore, waived by neglect to demur. (*Code*, § 144, *subd.* 1. *Id.* § 148. *Wilson v. Mayor, &c. of New York*, 6 Abb. 6.) The defendants rest their defense solely on the question of right. The whole case is before the court. The parties have agreed that the court shall decide it, and it has jurisdiction to decide it. We think this is sufficient.

*E. A. Raymond*, for the respondent. I. The ordinance for the improvement of Mount Hope avenue, was legally adopted on the 22d day of August, 1865. The requirements of the city charter as to the proceedings of the common council in making public improvements, are contained in sections 162, 163, 164. (*Laws of 1861*, p. 322.) The principal, if not the only objection made by the plaintiffs to the validity of this ordinance is, that although notice was published under its authority for all persons interested in the improvement, to attend the common council and make their allegations, on the evening of July 11, 1865, no opportunity was given by the council for the hearing of such allegations, at that time, and no other time was ever appointed. 1. The answer to this portion of the complaint is that such opportunity was given, and that all persons desiring it, might have been heard, had they chosen to appear at the time and place appointed. 2. There is no proof in the case that any persons desirous of making allegations on the subject matter of said improvement, attended at the time and place first appointed, offered to make such allegations, or were refused a hearing, or that no opportunity was afforded them. 3. Final action on the ordinance was regularly postponed from time to time, until

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August 22, 1865, *when allegations were heard*, and the ordinance passed by a vote of twenty-one, or three fourths of all the aldermen of the city, in its favor, to two against it. There was no evidence offered to show that any persons desirous of making allegations, were denied the opportunity at any of the meetings. 4. The clerk having published the notice for persons to appear and make allegations at the first time appointed, it was unnecessary to repeat that notice. (*Section 164 of the charter.*) (a.) The first adjournment on the 11th July, 1865, carried with it all the proceedings then pending, and all their incidents, and they were to be taken up at the next meeting, at the precise stage at which the preceding meeting left them. This is a general rule of parliamentary proceedings. (*Cushing on the Law of Legislative Assemblies*, §§ 514, 1589, 1590, 1625.) (b.) The common council could determine the rules of its own proceedings. (*Section 34 of the charter.*) It, therefore, had the right to adopt that method of proceeding which it did. 5. All the proceedings were published. The charter was complied with, and before the time of the final passage of the ordinance, all persons interested had legal notice by such publication, of the successive adjournments of this matter, and to appear and make their allegations at each meeting, including the last. All who appeared then were heard. The council acquired jurisdiction of the proceedings. They were regular, and the ordinance binding. (*Sandford v. Mayor, &c. of New York*, 33 Barb. 147.)

II. The resolution passed February 5th, 1867, directing an assessment of the deficiency of \$3319.92 upon the same persons originally assessed for the improvement, and enlarging the territory to be assessed, was legally adopted. It is authorized by section 207 of the charter. The only objection made to it is, that no notice was given to the tax-payers on South avenue that allegations against it could be heard. This is unfounded. 1. The improvement had been previously ordered and completed. Sections

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163 and 164, which, it is claimed by the plaintiffs, are made applicable to the proceeding for an assessment of an excess in the cost of the improvement, by the phrase, "and the same proceedings in all respects shall be had thereon," prescribe the manner in which the original ordinance shall be adopted. 2. The common council does not make the assessment. It directs the assessors to make it. (§ 191.) It does not necessarily hear allegations against the assessment. The assessors hear and decide upon such objections. (§ 196.) No objection can be heard against the improvement when an assessment to collect the excess in the cost of the work is to be made. Therefore the council in taking "*the same proceedings*" as in making the original improvement, is required only to order the re-assessment by the assessors upon the enlarged territory properly described. The assessors are required to notify the taxpayers within the enlarged territory of the time and place to make their objections. (§ 196.) They are to report the roll to the council, who may confirm it, or not, as it pleases. (§ 197.) When confirmed, it is final and conclusive. (§ 198.) The proceedings of the council commence with *directing* an assessment. As to *that*, the charter does not require that allegations should be heard. If the assessment had been only upon the persons originally assessed, of course they could not demand to be heard before the council again. They were once heard upon the *subject matter of the improvement*. (§ 164.) And as the council does not *make* an assessment, but merely *directs* it to be made, they could not be heard upon that subject before the council, but might have been before the assessors. Therefore, the council is not bound to hear allegations upon the question as to who shall be assessed. The next paragraph of section 207 is susceptible of this construction only, and thus helps to interpret the first paragraph now under discussion. 3. The resolution was published after its introduction, January 22, 1867, in the manner pre-

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scribed by the charter. Therefore the plaintiffs had due notice of the intention of the council to direct the assessment upon them. 4. The assessors gave due notice to the plaintiffs to appear before them and make objections to the assessment. (*Sections 196, 7, of charter.*) The assessment roll was duly confirmed by the council, March 6, 1867. It then became final and conclusive. (*Section 198 of charter.*) 5. The charter, as enacted April 8, 1861, (*Sess. Laws, 1861, p. 264.*) prescribed that the council should hear appeals from assessments. (§§ 195-199.) These sections were amended by chapter 553 of Laws of 1865, p. 1092, and proceedings upon assessments were materially changed. These amendments are now in force. But section 208, (or 207 in the compiled charter,) has remained unchanged. Therefore, there is now no provision in force for the council to hear any allegations from persons owning property within the *enlarged territory*, against the passage of a resolution or ordinance declaring them benefited, or proper to be assessed for the excess in the cost of the improvement, as there was before the amendment. They can only be heard before the assessors as to the amount of their respective assessments. 6. The legislature, by virtue of its supreme authority over the subject of taxation, had the right to confer upon the council, such an extended authority over this branch of local assessments, to be exercised in its discretion. (*The People v. Mayor of Brooklyn, 4 N. Y. Rep. 419. Brewster v. City of Syracuse, 19 id. 116. 31 id. 574. 24 Wend. 65.*) Taxation may be made without consent of the tax-payers. (*45 Barb. 210. 11 Abb. Pr. 180.*) 7. The effect of the exercise of such a discretionary power, is not the taking of private property without compensation. It is a mere apportionment of the burdens of a local improvement upon such persons as the local legislature deems benefited thereby. (*4 N. Y. Rep. 423, 24, 27, 38, 39, 41.*) 8. The council had authority to assess the whole *expense* of the

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work, whether it was correctly estimated when the contracts were let or not. (*Meech v. City of Buffalo*, 29 *N. Y. Rep.* 198.)

III. The objection to the question put to the surveyor, as to what the whole work cost, is not well founded. 1. The same question was asked him by the plaintiffs' counsel, but not directly answered. 2. This objection, and the general objection of the plaintiffs, that the common council could not assess the deficiency without showing the evidence of such deficiency in its proceedings, nor even then, are not tenable. (a.) The contracts provided for an increased expense. (b.) The court is bound to assume that good reasons existed for the exercise of this discretionary power by the common council, both in causing the increased expense, if such be the case, and in making a new assessment upon the original parties assessed, and upon others. (1 *Hill*. 562. *Luther v. Borden*, 7 *How. U. S.* 147.)

IV. The apportionment of the excess in the cost of the work over the estimate made by the common council and the assessors, is *conclusive*, unless fraud or corruption are alleged and proved. (9 *Paige Ch.* 16. 15 *Wend.* 374. *Lyon v. City of Brooklyn*, 28 *Barb.* 609, and cases there cited. *Barhyte v. Shepherd*, 35 *N. Y. Rep.* 238.) 1. It is not otherwise the subject of *judicial* review. (*Bank of Commerce Case*, 2 *Black, U. S.* 630.) 2. The power of taxing, and the power of apportioning taxation, are identical and inseparable. (*The People v. Mayor, &c. of Brooklyn*, 4 *N. Y. Rep.* 427, 429.) Abuses in the exercise of this power cannot be corrected by courts. (*Id.* 431, 432.) 3. Fraud is alleged in the complaint, but no proof of it was made.

V. All the persons united in interest not being made plaintiffs, this action cannot be sustained. (*Roosevelt v. Draper*, 23 *N. Y. Rep.* 319. 15 *Barb.* 375.) They were assessed only one fourth of the deficiency, and nothing on

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the original assessment which does not seem to be an excessive apportionment for building crosswalks and improving a street and sidewalks which they are constantly using. Upon the merits of *that* question, if properly cognizable by the court, the judgment should be affirmed, with costs.

VI. The location of South avenue, as appears upon the map, shows that the residents upon it are interested in the improvement of Mount Hope avenue, and benefited by it.

VII. The corporation is not liable for the unlawful or fraudulent acts of the common council. (35 *Barb.* 177. 2 *Denio*, 110. 2 *Barb.* 104, 111. 5 *Abb. Pr.* 325. 3 *N. Y. Rep.* 430. 3 *Seld.* 364. 20 *N. Y. Rep.* 312.)

*By the Court*, JAMES C. SMITH, J. There is no foundation for the objection taken by the plaintiffs, to the validity of the ordinance adopted by the common council on the 22d of August, that no opportunity was given to those about to be assessed for the proposed improvement, to make allegations against the ordinance as the city charter requires.

Before the common council determined to make the improvement, they caused a notice to be published, as required by the charter, specifying the improvement, the estimated expense thereof, and the portion of the city to be assessed for such expense, and appointing a time for all persons interested in the improvement, to attend the common council, and make their allegations. At the time appointed, to wit, on the 11th July, 1865, the common council met, and without taking final action respecting the proposed improvement, they adjourned from time to time till the 22d of August, when, as appears by the minutes of their proceedings, the board proceeded to hear allegations in relation to the proposed improvement, and after hearing such allegations from all the persons appear-

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ing, they adopted an ordinance for such improvement. All these proceedings were duly published.

The original notice being regular, and the board having met at the time therein appointed, they had jurisdiction of the proceeding, and could then hear allegations, if any were to be made, or could adjourn in their discretion, to any other specified time, in which latter case, the proceedings would be carried over to the adjourned day, to be then taken up at the stage at which they were left at the preceding meeting. In fact, the proceedings at the first meeting were adjourned, before allegations were heard, and they were continued in that stage to the 22d of August. At that time, the hearing of allegations was in order, and as is shown by the minutes, an opportunity to make them was then given. It does not appear that any person who attended the first or any subsequent meeting to make allegations, was denied an opportunity of making them, or was not heard. The proceedings were therefore regular in all the respects involved in the objection above stated.

It is also claimed by the counsel for the plaintiffs, that the resolution for the assessment of the deficiency of \$3319.92, upon the lots on Mount Hope avenue and South avenue, and the assessment in pursuance of it, were void. Several grounds are assigned for this position.

It is insisted that the common council were prohibited by the charter, from expending upon the improvement any sum beyond the original estimate of \$25,980. The provision of the charter relied upon for this position, is a clause which was adopted in 1865, as an amendment to section 164, and which provides that no contract shall be let for making any public improvement at a price greater than the estimate thereof. The amendment means, simply, that in contracting for making a public improvement, the work *included in the estimate* shall not be let at a higher price than that specified in the estimate. It does not prohibit the common council from causing other work to be

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done in addition to that included in the estimate, if they find it necessary in order to complete the improvement, and the amendment is not inconsistent with section 207 of the charter, which provides that if a greater sum of money is expended in the improvement than was estimated, the common council may direct an assessment to collect the same.

If it be assumed, therefore, as is done by the plaintiffs' counsel, in his argument, that the excess of expenditure was not for work included in the estimate, but was for work not embraced in the ordinance, the board had authority, under section 207, to direct an assessment of money to meet such excess.

It is also objected that there is no evidence that the expense of the improvement exceeded the estimate. But the common council having authority to make such expenditure in their discretion, and to levy an assessment to meet it, and having passed a resolution for that purpose which recites the fact that an expenditure had been made, in such improvement, of the sum of \$3319.92 in excess of the estimate, the resolution itself if valid, is at least *prima facie* evidence of such expenditure.

But another objection is taken to the resolution assessing the deficiency upon lots on South avenue, which is of a more serious character; to wit, that the owners and occupants of those lots, (among whom are the plaintiffs,) are assessed without hearing, and without notice.

Section 207, already referred to, provides that "if it shall appear that a greater sum of money has been expended in the completion of such improvements than was estimated as aforesaid, the common council may direct the assessment of the same on the owners and occupants of houses and lands benefited by such improvements, in the same manner as herein directed, and the same proceedings in all respects shall be had thereon, and the common council may enlarge the territory to be assessed for such



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*improvements.*" The action of the common council, by which, as the defendants' counsel contends, the territory was enlarged, and the plaintiffs were made liable to the assessment imposed on them by virtue of the provision above transcribed was as follows: On the 22d of January, 1867, a resolution was duly presented to the common council, reciting that on the 22d of August, 1865, the common council ordained that Mount Hope avenue should be improved, &c. and that the whole expense thereof should be assessed upon the owners and occupants of houses and lands to be benefited thereby; and did estimate such expense at \$25,980, and that a greater sum had been expended in making such improvement, amounting to \$3319.92, and directing that said sum of \$3319.92 be assessed upon the owners and occupants of one tier of lots on each side of Mount Hope avenue, from the Erie canal to the entrance to Mount Hope cemetery, "*and one tier of lots on each side of South avenue, from Mount Hope avenue to the city line.*" Action upon the resolution was postponed until the 5th of February, 1867, when it was adopted at a regular meeting of the board. There was no express declaration by the board, that the lots on South avenue were deemed to be benefited by the improvement, but the enlargement of the territory was effected, if at all, by directing in the language above transcribed, that said lots be assessed in connection with those on Mount Hope avenue, the latter lots being the portion of the city which alone was expressly declared by the ordinance of August 22, to be benefited by the improvement, and on which the expense of it was ordered to be assessed. The printed case laid before us states that all the proceedings of the common council in relation to such improvement, were published with all other proceedings of the board, as required by section 59 of the charter, as compiled in 1865, and as required by section 4, chapter 699 of the Laws of 1866. Section 59, provides that all ordinances for the

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violation of which any penalty may be imposed, shall be published for at least one week, and that all votes, ordinances and resolutions directing the payment of money, shall be published at least once within eight days after their passage, and section 4 directs that the common council may designate not more than two daily newspapers of the city in which the proceedings, resolutions and ordinances of the common council, and their committees, and of the city officers, may be published. All that can be assumed from the fact stated in the case, is that the resolution of February, 1867, was published in the proper newspapers, at least once within eight days after its passage. It is also stated in the case, that no time or place was appointed for hearing allegations in regard to assessing the owners and occupants of houses and lots on South avenue, or any enlarged territory, for said improvement or deficiency, and no notice requiring persons to attend the common council was published in connection with, or prior to, the passage of the resolution of February, 1867.

It is apparent from these facts that the action of the common council in respect to the owners of lots on South avenue was without notice to them, and without giving them an opportunity to be heard upon the question whether they were benefited by the improvement and should be taxed to defray the expense of it. For that reason, the resolution of February, 1867, is a nullity as to the plaintiffs. It is in the nature of a judicial proceeding against them, and its effect is to take their property for public use. It is a plain principle of justice, applicable to all judicial proceedings, that no person shall be condemned, or shall suffer judgment against him, without an opportunity to be heard. (15 *John*. 537. 15 *Wend*. 374. 23 *id*. 628. 3 *Barb*. 282.) The common council did not acquire jurisdiction as to the owners and occupants of lots on South avenue, by virtue of the original proceeding to

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which they were not parties. The proceeding was commenced, as to them, by the attempt to enlarge the territory. It is no answer, to say that by the original proceeding, the question whether the improvement should be made was conclusively decided. The question whether it benefited the plaintiffs, and they should consequently be taxed for it, was open, and on that question they had the same right to notice, and to an opportunity to be heard, as had the occupants of the original territory. Nor is it an answer to say, as does the counsel for the defendants, that the plaintiffs had an opportunity to be heard before the assessors. There, the only matter open to them, was the amount of their assessment. The defendants' counsel argued that the statute in question, conferring upon the common council this extended authority over local assessments, is a legitimate exercise of the taxing power. Undoubtedly so, if the statute provides for notice to those assessed, but not otherwise. In the case of *The People v. The Mayor of Brooklyn*, (4 N. Y. Rep. 419,) a leading authority upon this subject, the statute under which the proceedings were had, provided for a notice which in the language of Judge Ruggles, "gave to any person assessed an opportunity to be heard." (P. 441. See also 15 Wend. 374, 5.) The want of notice is not cured by the provisions of sections 207 and 208, declaring the proceedings valid, notwithstanding any "irregularity, omission or error." Those provisions do not extend to jurisdictional defects. As no notice, or opportunity to be heard was given, in fact, to the owners of lots on South avenue, the resolution of February, 1867, is for that reason, as has been said, a nullity as to them, and the defense must fail. This is so, without regard to the question whether the charter requires notice to be given. If it does, the requirement has not been complied with; if it does not, the provision authorizing an enlargement of the territory and the taxing of new parties thus brought in, without notice, transcends the power of the legislature,

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and is itself void. In either view of the case, the proceedings of the common council were unauthorized, and the plaintiffs are entitled to relief.

As, however, the question whether the charter requires notice, is of importance, not only with respect to further proceedings in reference to the very improvement out of which this controversy has arisen, but also to all persons liable to assessment in similar proceedings, it seems proper to consider it, before dismissing the case. The only provision of the charter, to which our attention has been called, expressly relating to the power of the common council to enlarge the territory, is that above transcribed from section 207. The clause giving the power does not, in express terms, require notice. But it is connected in the same sentence with another clause which provides that in case of deficiency, the common council may direct the assessment of the same on the owners and occupants of lands benefited by the improvement. The statute undoubtedly contemplates that whenever the territory is to be enlarged, such enlargement shall be effected in the same proceeding in which the assessment for the deficiency is directed; and that was the course pursued in the present case. The question therefore arises whether the common council can direct an assessment for a deficiency, without notice to those on whom such assessment will fall, even although they are occupants of the original territory, and as such had notice of the original proceeding? The statute provides that in case of a deficiency, "the common council may direct the assessment of the same, on the owners and occupants of houses and lands benefited by such improvements, *in the same manner as herein directed, and the same proceedings in all respects shall be had thereon.*" This language is not altogether perspicuous, but the better construction seems to be that the words "in the same manner," relate to the preceding word "direct," and not to the word "assessment." In other words, that they relate to the

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action of the common council, and not to that of the assessors merely. This construction is sustained by the context. The next sentence provides that "if it shall appear that any greater sum of money than was originally assessed has been expended for the benefit of the same property originally assessed, although not embraced within the improvement as ordered by the common council, the common council may, *in like manner*, direct the assessment of the same upon the owners and occupants of houses and lands benefited thereby." Here, the words "in like manner" refer explicitly to the action of the common council, and they strengthen the position that the corresponding words in the preceding sentence were intended to have the like effect. So, also, the last sentence in the same section, which declares valid all assessments or re-assessments ordered by the common council for local public improvements, "notwithstanding any irregularity, omission or error in the proceedings relating to the same," must be deemed to refer to the proceedings before the common council, as well as to those before the assessors. This construction of the words "in the same manner as herein directed," derives force, too, from the accompanying expression, "and the same proceedings in *all* respects shall be had therein," the word "therein" referring, not merely to the assessment, but to the whole proceeding.

What provisions of the charter, then, are adopted by the words in question? Clearly those relating to proceedings in cases of local assessments for public improvements, among which are sections 163 and 164. Section 162 declares that the common council shall not proceed, &c. except upon, (1.) The petition of at least a majority of the owners of property to be assessed; or (2.) The vote of at least three fourths of all the aldermen in favor of the improvement, after allegations have been heard. Section 164 requires the publication of a notice, and its provisions

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in that respect have been already referred to. Can there be a doubt that the provision of section 163, requiring a three fourths vote, unless upon a petition of a majority of the owners to be assessed, is necessary to a resolution directing an assessment for a deficiency? Such a vote was had in the case before us, but we have not been referred to any provision of the charter requiring it, unless it be the one in question. It is not necessary, nor would it be appropriate, that the precise form of notice prescribed by section 164, be adopted in proceedings for a re-assessment. It is enough that the notice specify the action proposed to be taken, and conform to the requisites of section 164, so far as they are applicable to the case. Of course, in the proceedings for a re-assessment, no person can be heard upon any question which was finally decided in the original proceeding. The question whether the improvement should be made, is of that nature. So, the owners and occupants of houses and lots in the original territory, who were duly notified, and were decided to be benefited by the improvement, and ordered to be assessed for it, cannot raise again the question as to their liability to be assessed. But the question whether the work has cost more than the estimate, is open to them, as well as to the occupants of the new territory proposed to be brought in, and the latter may also be heard in respect to the allegation that they are benefited by the improvement and ought to be assessed.

The whole policy of the statute, so far as it can be gathered from the language employed, is opposed to the idea that the owners of lands may be assessed for local improvements without notice, whether the assessment is for the purpose of raising the original estimate, or meeting a deficiency, and whether the lands are within the original or the enlarged territory. In short, the legislature have not expressed themselves in language which indicates an intention to exceed their constitutional powers, and such

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an intention is not to be implied, if a different construction can be fairly adopted.

It follows, from these views, that the resolution of the fifth February, 1867, should have been preceded by a notice, published as the charter provides, specifying the amount of the deficiency, describing the territory as enlarged on which it was proposed to assess the deficiency, and appointing a time when the common council would hear the allegations of all persons interested. And at the time appointed, an opportunity should have been given to the owners and occupants of lots in the enlarged territory to show cause why they should not be assessed. For the want of these prerequisites the resolution last referred to is void, so far at least, as it affects the owners and occupants of lots on South avenue.

The assessment being void as to the plaintiffs, their right to maintain this action is clear, not only to avoid a multiplicity of suits, but also to remove a cloud upon their respective titles, created by the lien of the assessment. (*Charter*, § 208. 14 *N. Y. Rep.* 534.) The objection taken on the argument, that all the persons united in interest are not made plaintiffs, is to be deemed waived, it not having been set up in the pleadings.

The judgment should be reversed, and a new trial ordered.

Ordered accordingly.

[MONROE GENERAL TERM, March 2, 1868. *E. D. Smith, Johnson and J. C. Smith, Justices.*]

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### McMANNIS vs. BUTLER.

Section 27 of the act of 1813, "to regulate highways," (2 R. L. p. 277, ch. 83.) adopted in the revision of 1830, (1 R. S. 520, § 99,) which provides that a street must be opened and worked within six years from the time of its being laid out, to make it a highway, has no relation to highways dedicated by the owners themselves to the use of the public, but was intended to apply exclusively to those laid out by the proceedings authorized by the act, in which lands could be taken without the owner's consent.

Where the evidence of a dedication of land by the owners, for a street, consists of clear, unequivocal and decisive acts of such owners, amounting to an explicit manifestation of their will to make a permanent abandonment and dedication of the land, which of themselves are sufficient to establish a dedication, without any intermediate period, if the land dedicated is unequivocally used and occupied for any continuous period of time, by the public at large, that will amount to an adoption of the dedication. But the user, in such a case, ought to be for such a length of time that the public accommodation, and private rights, might be affected by a revocation.

The proprietors of a tract of land caused the same to be surveyed, in December, 1823, and a map thereof to be made, laying out the same into village lots and streets, including certain land designated thereon as Burns street; which map was signed by them and recorded in the county clerk's office, in September, 1827. There was evidence tending to show a continuous use of Burns street as a public highway, from 1832 to 1865. Most of the travel proved was confined to that portion of the street which was necessary for transit from a street on the east to another on the west side of Burns street, yet for that purpose the line of travel was not directly across the latter street, but it was necessary to turn into that street and go along it a distance of from twenty-five to seventy feet, before turning into either of such other streets. For aught that appeared, Burns street was open its whole length, as mapped, and the testimony tended to show that for some distance it was fenced. In 1858, I. claiming title to the premises, erected a house thereon. Such house did not block up the street, but merely encroached upon it, and the travel went on, as before.

*Held* that under these circumstances the jury were justified in finding an *acceptance* of the dedication, by *public user*.

In 1858 the common council of Rochester, in which city Burns street was situated, caused the obstructions that had been placed in the street by I. and those claiming under him to be removed, with their consent, and the street to be improved; since which time it had been used as a street, until the plaintiff put up a fence on it; which the defendants tore down. I. was told, when he put up the house, that it was on the street. He admitted that it was, and said that if the street was ever improved, the house would have to be removed; and he set it on blocks, and made no cellar under it.



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*Held* that the action of the city authorities, in 1858 was a clear *acceptance* of the dedication, even if the previous user was not.

*Held, also*, that the question of revocation by I. of the dedication was one of fact, depending on the circumstances of the case; and that the jury were authorized to find, upon the testimony, that his acts were not intended by him as a revocation, and did not amount to it.

*Held, further*, that I. could not revoke the dedication unless he had succeeded to the title of the original proprietors.

Where the grantee in a quit-claim deed acquires, thereby, only an undivided portion of the interest of the original proprietors in land previously dedicated as a street, and his deed refers to the map on which such land was so dedicated, it may well be questioned whether the grant to him is of any thing more than the fee subject to the public easement. *Per* J. C. SMITH, J.

Whether the owner of an undivided portion of the estate can revoke a dedication made by the owners of the whole, prior to the grant to him. *Quare*.

**A** PPEAL by the defendant from an order made at a special term, granting a new trial. The facts sufficiently appear in the opinion of the court.

*E. A. Raymond*, for the appellant. The questions to be considered on this appeal, are :

1st. Whether the evidence tended to show that the piece of land, designated as Burns street, on the map made and filed by Charles Perkins and David McCracken, in December, 1826, they being then the owners of the large tract of land described on said map, became a public highway prior to 1853.

2d. Whether, if it had not become such highway prior to 1853, Milton Ingersoll revoked the dedication of it to the public, by his acts in 1853.

I. The verdict is sustained by the evidence, particularly under those portions of the charge of the court found at folios 120, 121, 122. 1. It was opened and used as a street. 2. "It was used and occupied for a continuous period of time by a distinct and unequivocal use of it on the part of the public at large, to wit, from 1832 to 1853." 3. There was no opposing evidence offered by the plaintiff. 4. The street from the east line of lots 1 and 2, as laid down

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on the map, to the ridge dividing it from Factory street, was about 35 to 40 feet in width. The fence ran on the east side of lots 1 and 2 as it now does. The ridge was from six to twelve feet high at the intersection of Champion street with Factory street, and so diminished to a point opposite the south end of lot two. People passed from Champion street down to Factory street, with and without loads, over Burns street, so far south, and then turned into Factory street. It was so used both in going and returning, and also in going from Perkins street to Champion street. After Ingersoll removed his little shanty on to Burns street, opposite the south end of lot two, in 1853, as shown on the diagram, there was a space from ten to twenty feet east of the shanty, and three or four rods south of it and extending to Champion street, which teams used in passing between the aforesaid streets. There was no fence on the east side of the house, running in either direction. The house was twelve by sixteen feet in size, so that not over one half the width of Burns street was occupied by Ingersoll. The street itself, as represented on the map, did not extend over about twelve rods south of Champion street. Therefore, *before* this shanty was put there, the public used the street in its entire length, and so much of its width as was necessary; and *afterwards* such use continued as before upon all the ground not occupied by it. 5. The use was for such a length of time, and under such circumstances of location, &c. "that the public accommodation would be seriously affected by a revocation of the dedication." There was no possible way of using Champion street except by the use of Burns street. The latter was not merely a *convenience*, but a *necessity*. It was also open and used as a street north of Champion street. The jury have found these facts by their verdict, and the evidence leads to no other conclusion.

II. The following sentence in the charge of the court was incorrect, viz. "that it was not a sufficient user of this

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piece of ground to make it a public highway, to cross it, or in going from Champion street to Factory street, to turn down through it, or to use it as a practical extension of Champion street, but that the jury must find it was used its entire length as a street." (*Holdane v. Trustees, &c.*, 21 *N. Y. Rep.* 479. *People v. Kingman*, 24 *id.* 559.) A *cul de sac*, or a road terminating on a bluff, or stream of water, may be a public highway. Whether this strip of ground was used as a practical extension of Champion street or not, is immaterial, if it was used by the public as a highway. The latter is the only question to be determined. The last clause of this portion of the charge, viz. "not that every part and parcel of the street must be used, but it must be used and regarded as a street," was correct.

III. The charge and decision of the court "that the statute of 1813, (*ch. 33, Laws of 1813*), is applicable to this case, and that this street must have been opened and worked within six years after its dedication to make it a public highway; and that if not so opened and worked it ceased to be a highway," was incorrect.

The act of 1813, chapter 33, section 23, is not applicable to this case. 1. It applies only to highways in towns, as distinguished from incorporated cities or villages. 2. Section 23 refers only to public highways, theretofore laid out by commissioners of highways, or by some public authority. This is evident from the general provisions of the act and from section 24, which recognizes a distinction between highways that had been laid out and roads which had become such by user for twenty years. 3. The Revised Statutes, (*vol. 2, p. 394, 5th ed. p. 521, margin, § 99*), refer only to highways laid out by some public authority. (*See also § 100.*) 4. This section, as amended by chapter 311, of the Laws of 1861, recognizes for the first time, a dedication of a highway to the use of the public. It is to a certain extent a legislative construction

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of previous statutes, as not embracing highways which had become such by dedication and user. 5. The term "opened," in all these statutes, means only the removal of obstructions from the land designed as a highway. 6. The land in controversy in this action was dedicated in 1826, by the owners of the public for a highway. If accepted by public user, within the decisions of the courts on this subject, it became by such dedication and acceptance, a highway, whether laid out by public authority, or worked within six years or not. It was unnecessary to open it, for there were no obstructions to remove. It was already open. 7. The village of Rochesterville was incorporated in 1817. (*Chapter 96, Laws of 1817.*) Its trustees were authorized to act as commissioners of highways, (§ 5.) See, also, the following acts, relating to the village of Rochester: *Chapter —, 1826; Chapter 120, 1828.*) In all of these acts, control over the highways, within the limits of the village, was conferred upon the trustees as commissioners of highways, and the highway acts of the state were so far superseded. 8. The city of Rochester was incorporated April 28, 1834, (*Laws of 1834, ch. 140.*) The common council were constituted commissioners of highways, with exclusive control over the streets and highways within the city. And the streets designated on previous plots of the village of Rochester, or parts thereof, were declared to be public highways. (§§ 20, 21.) A municipal corporation is governed by its charter, in all matters to which it extends. (*Mayor, &c. of Troy v. The Mutual Bank, 20 N. Y. Rep. 387.*)

IV. The charge that "if Burns street was not a public highway, so as to make these mortgages void, then the plaintiff was in the assertion of a right which he may maintain, and of which he could not be divested by force," was erroneous.

The question is not whether the mortgage of the Eagle Bank was void by reason of its being given upon land in

which the public had acquired an easement. The fee undoubtedly remained in the original proprietors, and Ingersoll's mortgage conveyed, if any thing, an undivided eighth, subject to the easement.

V. The court erred in refusing to decide and charge as requested by the defendants' counsel, at folios 126-129. The conveyance of William J. McCracken to Milton Ingersoll, by quit-claim deed, in 1850, was not designed and did not have the effect to convey to him, more than one undivided eighth of the land embraced within the exterior lines described in said deed, subject to the right of the public, in all the highways within their limits. 1. The words of description, "pieces, parcels and fractions of land," show that the grantor conveyed only such parcels of land as were not streets, either in actual use, or as indicated on the map referred to. 2. The reference to the map, by which the land in question was dedicated as Burns street, is also evidence of the same fact. 3. Milton Ingersoll did not therefore acquire title to any part of Burns street, divested of the easement of the public. 4. The Eagle Bank, by its mortgage, acquired no better title. 5. The plaintiff, by assignment and foreclosure, acquired no better title than the bank. By referring to the map in his deed, McCracken made it a part of it, and Ingersoll so accepted it. (*Bissell v. N. Y. Central R. R.*, 23 *N. Y. Rep.* 61. *Glover v. Shields*, 32 *Barb.* 374.)

VI. Milton Ingersoll; as one of the tenants in common of the premises in question, could not revoke the dedication made in 1826 by the original owners of the land.

1. At most he could revoke it only on behalf of himself. 2. The other seven heirs of David McCracken have never revoked the dedication of their ancestor. This is binding on them until revoked. As the dedication was unquestionably accepted by the action of the common council of the city of Rochester, in improving the street in 1857, it became then binding upon said heirs and their grantees,

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if not before, and they were estopped from asserting their title in hostility to the easement of the public, at any time thereafter. In the enjoyment of this easement, the plaintiff could not disturb his co-tenants, or their grantee, whom the defendant represented. One co-tenant cannot revoke a dedication or license made by his co-tenants in relation to the land held in common, (8 *Wend.* 505,) nor enter upon his co-tenant and oust him. (7 *Cowen*, 229.) 3. Neither the original owners nor their heirs, could have revoked the dedication in 1853, or at any subsequent time. (*People v. Kingman*, 24 *N. Y. Rep.* 560. *Holdane v. Trustees*, *fc.* 21 *id.* 479, 480. *Hunter v. Trustees*, *fc.* 6 *Hill*, 407, 412. *Cincinnati v. Lessee of White*, 6 *Peters*, *U. S.* 431. *Child v. Chappell*, 5 *Seld.* 256, 258.) After the lapse of twenty-seven years, and the use of the street more or less during that time, they were all estopped from excluding the public from the enjoyment of an easement, which had become a necessity. 4 Ingersoll did not revoke it. He occupied only the west half of the street, with a temporary structure, admitting that the land was a street, and recognizing the rights of the public. The Eagle Bank stood in no better position. The plaintiff is the first one who has attempted to obtain exclusive possession of the whole street. If the dedication had not been accepted by the public, then the fee of the land is in the eight co-tenants, and this plaintiff as one of them cannot maintain an action for trespass. All should unite. (13 *John.* 286. 14 *id.* 426. 15 *id.* 479.)

VII. The court erred in refusing to charge and decide as requested by the defendant's counsel, "That the Eagle Bank took its mortgage from Milton Ingersoll, with notice of the original dedication, of the extent of his interest, and of the character of his possession, of the situation of the premises with reference to their use by the public for a highway, and of the use thereof by the public, and also

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with notice on the mortgage itself that the land was in the street."

The Eagle Bank took its mortgage with notice of the following equities: (1.) The original dedication as shown by the map. (2.) The user by the public. (3.) The extent of Ingersoll's interest, one undivided eighth. (4.) His occupancy of only the west half the street, and the temporary character of that occupancy. (5.) The situation of the premises with reference to the use by the public, the fences, buildings, &c. (*Cook v. Travis*, 22 Barb. 338. 5 N. Y. Legal Obs. 334.)

VIII. The court erred in refusing to charge and decide as requested by the defendant's counsel, "That the plaintiff took his assignment of said mortgage with like notice, and also with notice of the improvement of the street, and expenditure of public money thereon by the city authorities in 1858, and of the use of the street since that time, and the acquiescence of the bank until 1864, or six years."

The plaintiff took his assignment with notice of all those facts, and also with notice of the improvement in 1858, and of the use of the street since then, together with the admission of the bank that the land was a street by the indorsements made on it at the time he received it. (*Williamson v. Brown*, 15 N. Y. Rep. 354. *Devenpeck v. Lambert*, 44 Barb. 598. 41 id. 130.)

IX. There being evidence tending to show a dedication and acceptance of the land in question as a street, which was not contradicted, the verdict of the jury should not have been set aside.

*J. C. Cochrane*, for the respondent. I. The defendant claims that the premises became a public street by dedication. There is no evidence of any acceptance of the street by the public until 1858, when the city authorities undertook to open it. For many years before that time

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the alleged street was fenced and occupied, and the right to accept no longer existed. (1 *R. S. Edm. ed.* 480. *The City of Oswego v. Oswego Canal Co.*, 2 *Seld.* 257.)

II. The practice of turning out of the line of Champion street to get into Factory street, was not an acceptance of Burns street. (*Holdane v. Trustees of the Village of Cold Spring*, 21 *N. Y. Rep.* 474.)

III. The defendant tore down the fences at both ends of the lot, at places never used by the public.

IV. If the plaintiff is in by right, his possession is that of all the owners, *prima facie*. Even if not so, he has a right to maintain this action, in respect to his own interest.

*By the Court*, JAMES C. SMITH, J. This was an action for trespass on lands. The defendant justified, as street commissioner of the city of Rochester, claiming that the premises were a public street. The cause has been tried twice. On the first trial, the jury, under the direction of the court, rendered a verdict for the defendant, which was set aside at general term. (49 *Barb.* 176.) On the second trial, the case was submitted to the jury, and resulted in a verdict for the defendant. A motion was made for a new trial, on the judge's minutes, which was granted, and an appeal was taken from the order, on which the cause now comes on to be heard.

The plaintiff proved that the premises in question were conveyed by William J. McCracken to Milton Ingersoll, by quit-claim deed, dated the 14th November, 1850; that soon afterwards, Ingersoll placed a house on the premises and rented it; that on the 8th August, 1857, he executed a mortgage, which was assigned to the plaintiff on the 21st February, 1865, and foreclosed, and the premises bid in by him on the 20th May, 1865; and that the plaintiff was in possession in the spring of 1865, when the defendant tore down the fences. The deed to Ingersoll referred



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to a map of McCrackenville, made by John Barbeau, as surveyor, December 13, 1826. The defendant proved said map, which was signed by David McCracken and Charles Perkins, who were admitted, by the plaintiff, to have then been the proprietors of the tract, and was recorded in Monroe county clerk's office, the 18th September, 1827. The tract covered by the map was laid out thereon into village lots and streets, and the premises in question were included in what was designated on the map as a street, called Burns street, which was adjoined on the west by several of said lots, and which was intersected by Brisbane, Champion and Perkins streets on the west, and Factory street on the east. It was admitted, that David McCracken died, in 1842, intestate, and leaving eight heirs at law, of whom the said William J. McCracken was one. The defendant then examined several witnesses, whose testimony, he claimed, tended to show that Burns street, or a portion of it, as laid down on the map, was used as a public street, continuously, from 1832 to the time when Ingersoll erected the house, which was about the year 1853; that the house occupied but a part of the width of said street, and the part not so occupied, continued to be so used until the year 1858, when the public authorities of the city of Rochester, having charge of the streets, tore down said house, with the consent of Ingersoll or his agent, and worked and improved the street, including the premises in question, and had the same under their control until the plaintiff took possession in the spring of 1865. The testimony in respect to its use by the public, showed that it was principally used as a means of passage between Factory street on the east, and Perkins and Champion streets on the west, and that the portions of the street not necessarily traversed in such passage, were used but very little, if at all. The premises in question were situated between Perkins and Champion streets, and nearly opposite the point where Factory street entered Burns. They were

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necessarily crossed in going from Perkins street to either Champion or Factory street by way of Burns, and there was evidence tending to show that in going from Champion to Factory street it was necessary to traverse a part of the premises in question.

The judge charged the jury that the acts of the proprietors in plotting the ground and recording the map, constituted a proposed dedication of all the ground specified as streets to the public; that if the street was formally accepted by the city authorities, or if it was open and used as such by the public, that was an acceptance of such dedication; that the proprietors could revoke the dedication at any time before the public had acquired rights to the proposed street by some corporate or official act, or by user; that the user in such case ought to be for such a length of time that the public accommodation and private rights might be affected by a revocation; and that if Burns street was used and occupied for any continuous period of time, by distinct and unequivocal use of it on the part of the public at large, then it would become a street, and that would amount to an adoption of the dedication.

The court further charged that it was not a sufficient user of this piece of ground to make it a public highway, to cross it, or in going from Champion to Factory street to turn down through it, or to use it as a practical extension of Champion street, but that the jury must find it was used its entire length as a street; not that every part and parcel of the street must be used, but it must be used and regarded as a street.

The court further charged that the statute of 1813, (2 *R. L.* p. 277, *ch.* 33, § 23,) is applicable to this case, and that the street must have been opened and worked within six years after its dedication, to make it a public highway, and that if not so opened and worked, it ceased to be a highway.

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The two portions of the charge last above stated, were excepted to by the defendant's counsel.

Upon the case stated, it is obvious that the question raised by the motion for a new trial, and involved in this appeal, is whether the testimony, in any proper view of it, warrants the conclusion that there was, at any time, an acceptance, by public user or official action, of the proposed dedication. But before discussing that question it is necessary to decide upon the correctness of the charge, that the street must have been opened and worked within six years after its dedication, to make it a public highway, as if that instruction is right, it limits the discussion to a very narrow range.

The statute of 1813, on which the charge was based, was in these words: "If any public highway, already laid out, or hereafter to be laid out, shall not be opened and worked within six years after the passing of this act, or from the time of its being so laid out, the same shall cease to be a public highway or road for any use, intent or purpose whatsoever." The act, of which this provision is a part, is entitled "An act to regulate highways," and it contains general provisions respecting the duties of town commissioners of highways, and among other things, as to the laying out of public highways, but it does not speak of highways dedicated to the public use. The language of the section above transcribed, as well as the context, very plainly indicates that the provision had no relation to highways dedicated by the owners themselves to the use of the public, but was intended to apply exclusively to those laid out by the proceedings authorized by the act, in which lands could be taken without the owner's consent. (It appears to have been passed upon the idea, that in the case of a highway laid out by proceedings *in invitum*, it was but just that the land should revert to the owner, if not used by the public as a highway in a reasonable time, and the limit of such reasonable time was fixed at six

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years; whereas, in the case of a highway by dedication, there was no need of such a provision, as the proprietor could revoke the proposed dedication, at any time before acceptance by the public.) The section was adopted in the revision of 1830, (1 *R. S.* 520, § 99;) and has continued without material alteration, until 1861, when it was amended, in several respects, and among others, by inserting after the words "already laid out," the words "and dedicated to the use of the public." This is a very explicit declaration by the legislature, that in their opinion the original section did not cover the case of a highway by dedication. Whether the section, in its present shape, applies to highways, by "dedication" in the technical sense of the term, may admit of a question, but it does not arise in this case, and therefore will not be considered.

The statute of 1813, being inapplicable to the case, the question to be considered is, whether there is any evidence of an acceptance of the dedication. It may be examined under two heads. (1st.) Public use. (2d.) Formal acts of the officers of the corporation.

In determining whether there is sufficient evidence of user to amount to an acceptance, it is to be borne in mind that this is not a case in which it is necessary to show an acquiescence on the part of the owner, in the free use and enjoyment of the way as a public road, for a sufficient length of time, to raise the presumption of a grant or dedication. The evidence of a dedication consists of clear, unequivocal and decisive acts of the proprietors, amounting to an explicit manifestation of their will to make a permanent abandonment and dedication of the land, which of themselves, are sufficient to establish a dedication, without any intermediate period. Under such circumstances, (to quote from the charge of the judge,) "if the land dedicated, was used and occupied for any continuous period of time, by distinct and unequivocal use of it on the part of the public at large, that would

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amount to an adoption of the dedication," or, as was also said in the charge, "the user in such case ought to be for such a length of time, that the public accommodation and private rights might be affected by a revocation."

In view of these rules, it can hardly be held as matter of law that there was no evidence whatever before the jury, of an acceptance by public user. There was abundant testimony, tending to show a continuous use of Burns street as a public highway, from 1832, to the very time of the erection of the fence in 1865, the removal of which is the alleged trespass complained of. It is said, however, that most of the travel proved, was confined to that portion of the street which was necessary for transit from Champion to Factory street. That is true; but for that purpose, the line of travel was not directly across Burns street. It was necessary to turn into that street, and go along it a distance of from twenty-five to seventy feet, according to the various estimates of the witnesses, south of the south line of Champion street, before turning into Factory street. Besides, for aught that appears, Burns street was open its whole length, as mapped, and the testimony tends to show that for some distance, it was fenced out, and that other portions of it besides that lying between Champion and Factory street were used as occasion required. The structures erected by Ingersoll did not block up the street; they merely encroached on it, and the travel went on as before. That portion of the street, which constitutes the *locus in quo*, was used as a highway continuously until 1853, when Ingersoll put his house on it, and subsequently that part of the premises not occupied by him, continued to be so used till 1858, when the house was removed by the city authorities, with his consent. Under these circumstances, the jury were justified in finding an acceptance of the dedication by public user. The testimony, instead of showing that Burns street was

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used as a mere continuation of Champion street proves the existence of the former street as conclusively as that of the latter, or of any other street in the map. There may have been less travel on Burns street than on either of the others, but that circumstance goes merely to the weight of the testimony.

As to the formal action of the corporate authorities, the testimony shows that in 1858, the common council caused the obstructions that had been placed in the street by Ingersoll and those occupying under him to be removed with their consent, and the street to be improved, since which time it has been used till the plaintiff put up his fence. It is claimed by the plaintiff that this action of the city did not operate as an acceptance, for the reason that Ingersoll by occupying the street years before, had revoked the dedication. Ingersoll could not revoke, unless he had succeeded to the title of the original proprietors. By the quit-claim deed from William J. McCracken, he acquired only one undivided sixteenth, or at most one eighth of the interest of McCracken and Perkins to the premises therein described. His deed referred to the map on which the land in question was dedicated as Burns street, and it may well be questioned whether the grant to him was of any thing more than the fee subject to the public easement. But passing that question, and also the point whether the owner of an undivided portion of the estate, could revoke a dedication by the owners of the whole, it is manifest that the question of revocation by Ingersoll, is one of fact, depending on the circumstances of the case. The jury were authorized to find, upon the testimony, that the acts of Ingersoll were not intended by him as a revocation, and did not amount to it. He was told when he put up the house, that it was on the street; he admitted that it was, and said that if the street was ever improved, the house would have to be removed, and he set it on blocks, and put no cellar under it. The verdict

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has settled this question in favor of the defendants, and that being the case, there is no answer to the position that the action of the city authorities in 1858, was a clear acceptance of the dedication, even if the previous user was not.

For these reasons the order granting a new trial should be reversed, and judgment should be ordered for the defendants, on the verdict.

All the judges concurring,

Ordered accordingly.

[MONROE GENERAL TERM, June 1, 1868. E. D. Smith, Johnson and J. O. Smith, Justices.]

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### GLEN and HALL vs. WHITAKER.

A delivery by a vendor, to a specified carrier, of the goods purchased, in pursuance of the verbal order and direction of the purchaser, is in law, a delivery to the latter, and *ipso facto* an acceptance by him of the property.

The parties made a parol agreement at Rochester, for the sale and delivery by the plaintiffs to the defendant of a clover machine, of the value of \$875. At the time when the agreement was made, a machine of the value and description of the one mentioned therein was completed, and pointed out to the defendant, who directed the plaintiffs to ship said machine by the New York Central Railroad to S. at Penn Yan. The machine was so shipped, and received by S. and was retained by him with the knowledge of the defendant, and was not returned to the plaintiffs. *Held*, that these facts were conclusive, and sustained the conclusion of the referee that as between the vendors and vendee, the latter accepted the property.

*Held, also*, that the rights of the parties were fixed by the delivery of the machine to the carrier, pursuant to the directions of the defendant, and that the title thereby passed to him. And that a letter, subsequently written by the defendant, repudiating the agreement and countermanding the order for the machine, was ineffectual as a countermand.

That in the absence of fraud, or of evidence showing that the machine was not the same he selected, or that it was not in as good condition at the time of delivery, as it was at the time of selection, the purchaser had no right to return it, after it was delivered to the carrier. That the case was the same, in that respect, as if the delivery had been to himself personally.

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**A** PPEAL from a judgment entered upon the report of a referee.

The action was brought to obtain the specific performance by the defendant of a parol agreement made by him with the plaintiffs, at Rochester, N. Y. on the 16th day of January, 1867, for the conveyance by the defendant to the plaintiffs, of a shop right under a patent for an improved clover machine. The defendant took issue upon the consideration of this agreement, which is the principal issue in the case. The action was referred, and tried before a referee in December, 1867. On the trial it appeared that the defendant and the plaintiffs, at the plaintiffs' machine shop in Rochester, on the 16th of January, 1867, made an agreement by parol, that the plaintiffs should sell to the defendant, and deliver to one Shattuck, at Penn Yan, a clover machine which the plaintiffs then had previously made for said Shattuck, and the defendant in payment therefor should convey to the plaintiffs the shop right above mentioned. That during the conversation in which this agreement was made, the defendant told the plaintiffs to ship such clover machine to said Shattuck at Penn Yan, by the New York Central Railroad. It was also proved that such machine was delivered by the plaintiffs to the agent of said railroad company at Rochester, on the 19th day of January, 1867. That such machine did not arrive at Penn Yan until the 26th day of the same month. That on the 17th day of January aforesaid, the defendant at Penn Yan being dissatisfied, wrote a letter designed for the plaintiffs, repudiating said agreement, and countermanding any order for the machine, which letter came to the plaintiffs' hands on the 23d of same month, and on the 19th of same month, the defendant notified said Shattuck of such countermand, and that he would have nothing to do with the agreement. That Shattuck, notwithstanding, took the machine and kept it, storing it for a time in the Commercial Iron Works, owned in part by the defendant,



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and on the 7th of March following the plaintiffs tendered to the defendant a conveyance of such shop right under said patent, for execution by the defendant, which he refused to execute.

The referee found as conclusions of law :

*First.* That the unconditional delivery to the railroad company of the machine, in pursuance of the order and direction of the defendant, was a delivery in law to him, and *ipso facto* an acceptance by him of the property.

*Second.* That the countermand of his order, after it had been complied with by the plaintiffs, and after an act done which placed the machine in the hands of the agents of the defendant, and beyond the control of the plaintiffs, was a nullity.

*Third.* That the agreement, although by parol, being performed by the plaintiffs, as directed by the defendant, the plaintiffs were entitled to have it specifically performed by the defendant.

He accordingly directed a judgment to be entered in favor of the plaintiffs, with costs. From which judgment the defendant appealed.

*Charles G. Judd*, for the appellant. 1. The agreement by parol sought to be enforced, was executory, for the sale of personal property of the value of over \$50, and before it was executed by either party was revoked by the defendant. 1. The defendant's letter dated January 18, 1857, was received by the plaintiffs January 23, and before the machine was delivered by the railroad company to Shattuck, on the 28th of the same month. This was a countermand of the defendant's order, and a repudiation of the whole agreement. 2. This revocation was before the performance of the agreement by the plaintiffs, for they were to ship the machine to Shattuck at Penn Yan. The delivery to Shattuck could not be completed until it reached him at Penn Yan. 3. At

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all events, the defendant's revocation was received by the plaintiffs before the defendant in any way accepted the delivery of the machine, which was sufficient to annul the agreement.

II. The referee erred in his finding of fact that the machine was received by Shattuck on or before the 25th of January, 1867. The only proof on the point is by Whitaker. That it was not received by Shattuck until the 28th of January.

The referee erred in finding that "*after* the contract between the parties was completed, the defendant directed the plaintiffs to ship said machine by the Central Railroad, to Shattuck, at Penn Yan, *in the usual manner*, and *subject* to the orders of said Shattuck." The only proof on this point is that showing clearly that the direction to ship was given only at the time of making the agreement, and as a part of it; and no other direction was given as to the manner of shipping, except to send by the Central railroad, and nothing about shipping subject to the order of Shattuck; the direction being to "*send the machine down to Penn Yan, and deliver it to Shattuck.*"

IV. The referee erred in finding "that the unconditional delivery to the railroad company of this machine, in pursuance of the order and direction of the defendant, was a delivery in law to him, and *ipso facto* an acceptance by him of the property." 1. The delivery was not complete for the reasons before stated. 2. The defendant did no *act* up to this time, nor afterwards, indicating an acceptance by him of the delivery. To constitute such acceptance of the property, it must be by some *act*, something done positive and certain, indicating it beyond words merely—acts done *under* the contract, and while that remains unrevoked, as evidence of a purpose to *accept the ownership* of the property, and these acts are to be concurred in by *both* parties. (2 *Sandf.* 157. *Good v. Curtiss*, 31 *How.* 4, 11. 6 *Wend.* 401. *Brabin v. Hyde*, 32 *N. Y.*

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*Rep.* 519, 522. *Shindler v. Houston*, 1 *id.* 261. *Sprague v. Blake*, 20 *Wend.* 61. *McKnight v. Dunlop*, 5 *N. Y. Rep.* 537, 544.) 3. There is no evidence that the delivery to the railroad company was "unconditional."

V. The referee erred in deciding that the railroad company were the defendant's agents. Testimony on this point is referred to under third point above. Neither was Shattuck such agent after the notice given to him by the defendant on the 19th of January, above referred to. Shattuck, in taking the machine and keeping it as he did on his own responsibility, after such notice to him, and after the total repudiation by the defendant of the agreement on the 23d of January, in his letter to the plaintiffs, could not be held to be acting as the defendant's agent, but for himself only. The proof clearly shows that the defendant never, in any way or manner, intermeddled with the machine, or derived any benefit from it.

VI. But it is said that if the repudiation of the machine by the defendant was effectual, it would work some inconvenience to the plaintiffs. And for this reason it may be fair to infer that the learned referee was disposed to aid the plaintiffs, by his decision in the case. If these consequences of inconvenience, or even of loss, had occurred to the plaintiffs for that cause, they would have no cause to complain, for the reason that they knew at the time, or are presumed to have known, that they were acting upon an imperfect agreement, which was liable to be revoked and repudiated by the defendant. The risk of this they voluntarily assumed. On the other hand, however, the defendant ought not to suffer, for he promptly and fully notified the plaintiffs of this revocation, and had not his letter been delayed by the accidental misdirection, it would have reached the plaintiffs, by the ordinary course of the mail, before the machine was delivered at the depot. Again, the plaintiffs would not suffer any loss in the case supposed, since Shattuck is good and responsible for the value

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of the machine, and for aught that appears, would have paid for it if requested.

*H. Humphrey*, for the respondents. I. The testimony sustains the case made by the complaint, and the facts found by the referee.

II. The direction by the defendant, *after having seen the machine*, to ship it by rail to Shattuck at Penn Yan, and the shipment of the same on the 19th of January, 1867, were a delivery and acceptance, which took the case out of the statute of frauds. (*People v. Haynes*, 14 Wend. 546. *Grosvenor v. Phillips*, 2 Hill, 147. *Dyer v. Forrest*, 2 Abb. Pr. 82. *Ryan v. Dox*, 34 N. Y. Rep. 311-313. *Outwater v. Dodge*, 6 Wend. 397.)

III. The letter claimed to have been a countermand, having been directed to F. W. Glen, then residing in Canada, and not having come to the plaintiffs' hands, until January 23, four days after the machine had been shipped, was, as a countermand, a nullity.

IV. The defendant having received the machine into his warehouse, and suffered Shattuck to take it away, and use it as his own, this was an affirmance of the contract, a retraction of his countermand, and estops him to set up the statute of frauds.

V. The performance of contracts like this, where damages are uncertain, will be specifically decreed in equity. (*Story's Eq. Jur.* 715-726.)

*By the Court*, JAMES C. SMITH, J. The principal question in this case, is whether the delivery by the plaintiffs to the rail road company, of the machine in controversy, in pursuance of the order and direction of the defendant, was, in law, a delivery to him, and *ipso facto* an acceptance by him of the property, as decided by the referee.

The referee found as facts, that the parties made an agreement, without writing, for the sale and delivery by

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the plaintiffs to the defendant, of a clover machine of the value of \$375; that at the time when the agreement was made, a machine of the value and description of the one mentioned in the agreement was completed and pointed out to the defendant and examined by Shattuck, to whom the defendant directed the plaintiffs to ship said machine by railroad; and that the machine was so shipped and received by Shattuck, in due course, and was retained by him with the knowledge of the defendant, and has not been returned to the plaintiffs.

These findings are supported, either by testimony which is uncontradicted, or by conflicting testimony which would warrant a finding either way, and they are, therefore, conclusive. And they fully sustain the conclusion of the referee, that as between the vendors and vendee, the latter accepted the property.

It was long ago decided in England, that where a *written* order for goods is given, so as to take the case out of the statute, and the purchaser directs them to be sent by a *particular* carrier, the title vests in the vendee immediately upon the delivery to the carrier, and he is responsible to the vendee, though the goods be lost by the carrier, and never actually come to his possession. (*Vale v. Bayle, Cowp. 294.*) Again, it was held that though the vendee do not name any particular carrier, but directs the goods to be sent by a carrier, the moment the goods are delivered to the carrier, it operates as a delivery to the purchaser, and the whole property immediately vests in him. (*Dutton v. Solomonson, 3 Bos. & Pul. 582.*) These cases, (as was remarked by Sutherland, J. in *Outwater v. Dodge, (6 Wend. 401,)* have been considered as justifying the inference that where goods are delivered upon a *verbal* order, the delivery to the carrier would be such an execution of the agreement on the part of the vendor, as to preclude him from taking advantage of the statute of frauds to reclaim the goods; but that the vendee might still refuse to execute

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the parol agreement; that he might open and examine the goods, and after examination, return them. Where the verbal order, however, is particular, both as to the goods and the carrier, it has been regarded as furnishing a plausible ground for contending that such selection of the goods, and designation of the receiver, may amount to an acceptance, with which the actual delivery, though posterior in point of time, might be coupled by relation, so as to put the whole transaction out of the operation of the statute. The goods being fixed upon by the buyer, and the carrier named by him, the contract is established upon the evidence of the acts of the vendee. (*See Roberts on Frauds*, 180.) These views as to what acts of the vendee constitute an acceptance, seem to have received the sanction of judicial authority in the case of *The People v. Haynes*, (14 *Wend.* 546.) In that case the court for the correction of errors, reversing the Supreme Court, held that where a purchase of merchandise is made, the goods *selected by the purchaser*, put in a box and the name of the purchaser and his place of residence marked thereon, and the box containing the goods sent by the vendor and put on board a steamboat *designated by the purchaser*, to be forwarded to his residence, the sale is complete, and the goods become the property of the purchaser. In that case, it is true, the vendee and not the seller, insisted that the title passed by the delivery to the carrier, but the transaction was complete, as to the purchaser as well as the seller, he having previously selected the goods.

In the present case, we think it clear that the rights of the parties were fixed by the delivery of the machine to the carrier pursuant to the directions of the defendant, and that the title thereby passed to him. His letter, subsequently written, was ineffectual as a countermand. In the absence of fraud, or of evidence showing that the machine was not the same he selected, or that it was not in as good condition at the time of delivery, as it was

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at the time of selection, he had no right to return it after it was delivered to the carrier. The case is the same, in that respect, as if the delivery had been to himself, personally.

These views lead to an affirmance of the judgment.

Judgment affirmed.

[MONROE GENERAL TERM, June 1, 1868. *E. D. Smith, Johnson and J. C. Smith, Justices.*]

SARAH DAWSON, administratrix, &c. *vs.* PATRICK HORAN  
and others.

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The charter of the city of Rochester, which creates three justices of the peace in said city, to be elected by the legal voters of the city, and provides that in exercising civil jurisdiction, they shall be deemed justices of the peace of the county of Monroe, and that the general laws relating to proceedings before justices of the peace of the several towns in the state, shall be applicable to proceedings before them, does not violate the provisions of section 17 of the 6th article of the constitution of this state, respecting the mode of electing justices of the peace.

Those provisions relate only to justices of the peace of towns; and the 14th section expressly empowers the legislature to establish, in cities, inferior local courts of civil and criminal jurisdiction, and the enactment of the charter is a valid exercise of such power.

The provision of the charter which makes applicable to proceedings before the city justices, all the general laws of the state relating to proceedings before the justices of the several towns, is sufficiently comprehensive to embrace subsequent as well as prior enactments.

The law extending the jurisdiction of justices, in actions on contract, to \$200, (*Laws of 1861, ch. 158.*) having been passed on the same day as the charter of the city, it is to be presumed that, in enacting it, the legislature had in view the provision of the charter above referred to. The effect of the two enactments, read together, (as they should be,) is to extend the jurisdiction of the justices of the peace of the city of Rochester.

The act of 1861, extending the jurisdiction of justices of the peace is not void as being in violation of the provisions of the constitution respecting the right of trial by jury. (*Const. art. 1, § 2.*)

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There is nothing in the constitution which prohibits the legislature from enlarging the jurisdiction of justices' courts in the mode contemplated by that act. Such increase of jurisdiction is not obnoxious to the constitutional provision referred to, by reason of the circumstance that it transfers a class of cases from courts of record where juries are composed of twelve men, to justices' courts in which they consist of six. The right of trial by jury remains unimpaired, in each court.

**A**PPEAL by the defendants from a judgment of the Monroe county court. The action was commenced before W. R. Carpenter, Esq. a justice of the peace of the city of Rochester, and was brought to recover wages for labor by the plaintiff, as foreman on Front street improvement, in 1861, alleged to be due the plaintiff from the defendant Horan, and charging the other defendants as also liable in said action, for that they were sureties with said Horan on a laborers' bond, given in pursuance of the provisions of the Rochester city charter. The defendants denied indebtedness; the execution of a laborers' bond by them, or either of them; averred settlement, payment, set off, and that the hiring was for \$50 per month. No objection was made to the jurisdiction, and a judgment was rendered by the justice in favor of the plaintiff, against the defendants, for \$204, damages and costs. The defendants appealed to the county court. On the trial in that court, the defendants at the close of the plaintiffs' evidence, and again at the close of the testimony on both sides, moved for a nonsuit, on the following grounds.

"1st. The case arose in a justice court, and the amount of the accounts between the parties was over \$400, and therefore, the justice had no jurisdiction to try the cause, and the complaint should be dismissed.

2d. The justice who tried the cause, was a justice of the peace of the city of Rochester, and not of a town, and the act creating his office is unconstitutional and void, because the measure of his jurisdiction is the same as that of justices of the towns.



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3d. Again, the justice had no jurisdiction beyond \$100 and his judgment in this action was void.

4th. The act enlarging the jurisdiction of a justice of the peace to \$200, is unconstitutional and void, and the judgment appealed from is void, and the whole should be dismissed.

5th. There is no legal evidence to submit to the jury, that a laborers' bond was executed.

6th. There is no evidence of any such instrument as a laborers' bond, nor of the loss thereof.

7th. If there was evidence to go to the jury, on the execution of the bond, no legal bond was proven, as no seals were shown to be attached, and an instrument under seal is required."

The motion for a nonsuit was denied, and the defendants excepted.

It was conceded on the trial that William R. Carpenter, the justice before whom the cause was tried, was a justice of the peace of the city of Rochester, which office was created by the city charter, and that Carpenter was elected under the charter.

The jury found a verdict in favor of the plaintiff, for \$150, and judgment was entered affirming the judgment of the justice, as to that amount, with costs.

*Bowen & Pitts*, for the appellants. I. The accounts between the plaintiff and Horan amounted to over \$400, and therefore the justice had no jurisdiction to try the same, and his judgment was void, and the county court erred in refusing a nonsuit on that ground. There had never been a settlement between the parties, and their accounts were unliquidated. (*See Abernathy v. Abernathy*, 2 Cowen, 413. Code, § 54, subd. 4.)

II. This action was an appeal from a judgment rendered by W. R. Carpenter, a justice of the peace of Rochester, elected under the provisions of the charter of said city.

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The provisions of law creating and defining the jurisdiction of such office, are found in sections 7 and 253 of chapter 262 of Laws of 1850, and section 237 of chapter 143 of Laws of 1861. The intention of the above provisions was to create three justices of the peace for Rochester, the same in all respects, except as to the manner of election, as are provided for the several towns of the state, and clothe them with the same territorial jurisdiction, &c. Such being the case, the above provisions are obnoxious to the constitution and void; justices of the peace are to be elected by the electors of the towns, (*Const. art. 6, § 17.*) and can be elected in no other way; therefore, the above provisions are void, and the justice had no authority to try this cause and render judgment therein. (*Brandon v. Avery, 22 N. Y. Rep. 469. Waters v. Langdon, 40 Barb. 408.*) In no case could the said justice entertain jurisdiction beyond the sum of \$100. The enlarging of the jurisdiction of justices of the peace, related to such as are elected pursuant to section 17, of article 6, of the constitution. (*See Code, § 53; Yager v. Hannah, 6 Hill, 631; Bryan v. Cain, 1 Denio, 507.*)

III. The amendment of section 53 of the Code, in 1861, extending the jurisdiction of justices of the peace, to the sum of \$200, is unconstitutional and void; therefore it follows that if the law creating the office of justices of the peace in the city of Rochester is constitutional, and the amendments of section 53 of the Code apply to the justices of the peace of the city of Rochester, yet as those amendments are unconstitutional, the justice acted wholly without jurisdiction and his judgment is void. Section 2, of article 1, of the constitution, provides that the right of trial by jury shall remain forever inviolate, &c. The jury contemplated by the said section, is a common law jury of twelve men. (*Wynehamer v. The People, 3 Kern. 378, 427, 458, 484.*) The word "heretofore," as used in said section, means before 1846. (*See Wynehamer v. The People,*

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*supra.*) Before and up to 1846, courts of justices of the peace had jurisdiction in certain cases in an amount not exceeding \$100. (*See Sess. Laws of 1840, ch. 317, p. 265.*) This section of the constitution relates only to the trial of issues of fact in civil and criminal actions in courts of justice. (*Beekman v. Saratoga and S. R. R. Co., 3 Paige, 45. Livingston v. The Mayor of N. Y. 8 Wend. 85. Matter of Smith, 10 id. 449.*) In all legal actions involving a greater sum than \$100, the parties were entitled to have the same tried by a common law jury, at the time of the adoption of the constitution of 1846. (*See Const. of 1822, art. 5; also § 7 of art. 4, and § 7 of art. 7; see chaps. 1 and 2 of part 3 of the R. S.; and § 1 of art. 1 of ch. 3 of part 3 of the R. S.*) Thus it is plain that the amendments of section 53 of the Code in 1861, take away a right secured by the constitution and are therefore void.

[Other points, not considered by the court, are omitted.]

*J. Van Voorhis*, for the respondent. I. The point that the justice was ousted of jurisdiction because the accounts between the parties amounted to over \$400, is not valid. 1. The plaintiff's work came to \$843.78 altogether. This had been reduced by payments to \$204.10. The amount of payments being \$639.68. All the accounts were work on one side and pay on the other. 2. There was no dispute about the payments. The only dispute was about wages. Payments are not accounts, but extinguish the debt *pro tanto*. (*Matteson v. Bloomfield, 10 Wend. 556, 557. Lamore v. Caryl, 4 Denio, 370. Crim v. Cronkhite, 15 How. Pr. 250; 2 Cowen, 118; 1 E. D. Smith, 578.*) That the plaintiff collected and disbursed some moneys for Horan, cannot bring him within the rule contended for; certainly not when it is shown by the defendant himself that Horan's account agrees with the plaintiff's except the plaintiff credits Horan with \$4 or \$5 more than Horan's own

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book-keeper does. The amount in dispute was simply \$204.10.

II. The second, third and fourth grounds of nonsuit, go to the jurisdiction of the justice. 1. That justices' courts exist in the city of Rochester, and have the same jurisdiction as the same courts in any other place in the state is too clear to admit of serious argument. Section 53 of the Code provides what their jurisdiction is, and clearly relates to all justices' courts, and the amount over which they have jurisdiction is the same. 2. But the defendants are not in a position to raise the question. It was not raised in the court below nor by the notice of appeal. (15 *How.* 32. 16 *id.* 471. 17 *id.* 255.) This is the settled law of this district.

[Other points omitted.]

*By the Court*, JAMES C. SMITH, J. After an attentive examination of the numerous points taken by the appellant's counsel, I am unable to discover any substantial error in this case.

The charter of the city of Rochester creates three justices of the peace in said city, to be elected by the legal voters of the city, and provides that in exercising civil jurisdiction they shall be deemed justices of the peace of the county of Monroe, and that the general laws relating to proceedings before justices of the peace of the several towns in the state shall be applicable to proceedings before them. (*Laws of 1850, ch. 262, §§ 7, 253; Id. 1861, ch. 143, § 237.*) This, it is claimed, violates the provisions of section 17 of the 6th article of the constitution of this state, respecting the mode of electing justices of the peace. But those provisions relate only to justices of the peace of towns. The fourteenth section expressly empowers the legislature to establish, in cities, inferior local courts of civil and criminal jurisdiction, and it is not perceived why the

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legislation in question is not a valid exercise of such power.

The cases of *Brandon v. Avery*, (22 N. Y. Rep. 469,) and *Water v. Langdon*, (40 Barb. 408,) are cited by the appellant's counsel, but they do not sustain his position. It was held in the latter case, and remarked in the former, that the legislature cannot provide for the election of a police justice by the electors of an incorporated village situated within, and being but a part of, one of the towns of the state, and clothe him with the same jurisdiction as a justice of the peace of the town. Such a provision would clearly violate the seventeenth section, which confers the power of electing justices of the peace in towns, upon all the electors in each town. But the charter of the city of Rochester has no such effect, and there is nothing in the cases cited to show that it is unconstitutional.

The provision of the charter which makes applicable to proceedings before the city justices, all the general laws of the state relating to proceedings before the justices of the several towns, is sufficiently comprehensive to embrace subsequent as well as prior enactments. The law extending the jurisdiction of justices in actions on contract, to \$200, (*Laws of 1861, ch. 158*,) was passed on the same day as the charter of the city, and it is to be presumed that, in enacting it, the legislature had in view the provision of the charter above referred to. The effect of the two enactments, read together, as they should be, is to extend the jurisdiction of the justices of the peace of the city of Rochester.

Next, it is claimed, that the act extending the jurisdiction of justices of the peace, is itself void, for the reason that it violates the provisions of the constitution respecting the right of trial by jury. (*Art. 1, § 2*.) There is nothing in the constitution which prohibits the legislature from enlarging the jurisdiction of justices' courts in the

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mode contemplated by the act. Such increase of jurisdiction is not obnoxious to the constitutional provision referred to, by reason of the circumstance that it transfers a class of cases from courts of record where juries are composed of twelve men, to justices' courts in which they consist of six. The right of trial by jury, remains unimpaired in such court. The constitution of 1821 contained a similar provision, (*art. 7, § 2,*) but the validity of the act of 1840, (*ch. 317,*) which extended the jurisdiction of justices' courts from \$50 to \$100, was never questioned.

There is no other point in the case which requires comment.

The judgment should be affirmed.

Judgment affirmed.

[MONROE GENERAL TERM, JUNE 1, 1868. *E. D. Smith, Johnson and J. C. Smith, Justices.*]

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BABBETT vs. YOUNG.

Where there is a variance between the complaint and the proof, in regard to the time of delivery and acceptance of property, which has not misled the defendant, the court in the exercise of its discretion, may direct the jury to find the fact according to the evidence.

Where there is nothing in the body of a written agreement, or in the form of a party's signature, to indicate that the obligation thereby created was intended to be any other than a personal obligation on his part, parol evidence is inadmissible to show that the agreement was in fact the obligation of third persons, and that such party signed it as their agent.

*It seems* the rule is otherwise where it appears in the body of the instrument, or from the signature of a party thereto, that he was acting for others and intended to bind them, and not himself.

Where a party sued upon an agreement executed by him in his own name, does not claim, upon the trial, to recoup any damages except such as have accrued to third persons, by the plaintiff's alleged breach of the agreement, and they are not shown to be parties to the agreement, an offer to prove a counter-claim in their behalf, is properly overruled.

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Under section 97 of the act of congress, passed June 30, 1864, "to provide ways and means for the support of the government, and for other purposes," (18 *U. S. Stat. at Large*, p. 270,) which provides "that every person, firm or corporation who shall have made any contract prior to the passage of this act, and without other provision therein for the payment of duties imposed by law enacted subsequent thereto, upon articles to be delivered under such contract, is hereby authorized and empowered to add to the price thereof so much money as will be equivalent to the duty so subsequently imposed on said articles, and not primarily paid by the vendee, and shall be entitled by virtue hereof, to be paid, and to sue for and recover the same accordingly," prepayment of the duty by the vendor is not a requisite to his claim to recover the same of the vendee, in an action brought for the price of the goods sold.

By section 94 of that act, the manufacturer is made liable primarily for the payment of the tax; and this liability makes his claim against the vendee as complete as if he had actually paid. The effect of section 97 is to cast this liability, ultimately, upon the party purchasing of the manufacturer. The law merely adds to the certainty of collection, and is but one of the means which congress had power to adopt, to accomplish the end designed.

THE complaint in this action contains two counts. The first alleges an agreement in writing, executed by the plaintiff and defendant, dated the 8th of April, 1864, wherein the plaintiff agreed to furnish and deliver certain machinery therein specified, to the defendant, on or before the 1st day of August, then next, with a stipulation that if the plaintiff should use all proper diligence to complete the same by the 1st of August, and should fail, nothing in the agreement should be so construed as to compel the plaintiff to pay damages therefor; and with a further stipulation that no damages should lie against the plaintiff, under the agreement, if he should have the last of said machinery ready for delivery on or before the 1st day of October, then next. The defendant agreed to pay for such machinery, certain prices specified in the agreement, \$4500 thereof to be paid at any time when the plaintiff should require it for the payment of help or the purchasing of material for said work, and the balance to be paid on the completion of the job. It was also stipulated that the whole job was to be made and furnished as the defendant

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*Babbett v. Young.*

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should direct, and that he was at liberty to make any alterations in the specifications contained in the agreement that he might deem advisable, provided the plaintiff incurred no additional expense thereby. The complaint averred that subsequently to the execution and delivery of the agreement it was modified by the parties, in certain respects, therein specified, in relation to the construction of the machinery. And the complaint averred that "all of the machines, which by the terms of said contract as modified as aforesaid, said plaintiff was to furnish and deliver were, in pursuance thereof, duly furnished and delivered to said defendant by said plaintiff, and were received and accepted by said defendant." The complaint also alleged that the material necessary to build said machinery, and which the plaintiff necessarily purchased after the date of the contract increased in market value to the sum of \$417.17. The second count was for an increased tax or duty upon the manufactured articles in question, imposed by an act of congress passed subsequently to the making of the contract, and referred to in the complaint.

The answer (1) denied that the machinery was made and delivered to the defendant and accepted by him, in pursuance of, and according to the terms of the contract, as modified; (2) alleged that the contract was made by the defendant on behalf of the firm of Barber, Sheldon & Co. which was known to the plaintiff; that the machinery was delivered to said firm and paid for by them, and they should be the parties defendant; (3) denied any rise in the price of the materials, had the plaintiff used due diligence in manufacturing the machines; (4) alleged that the plaintiff did not use due diligence, and the machinery was not all made, and was not received as being in conformity with the contract, and the defendant did not waive compliance with the contract; (5) alleged that the machinery was of inferior quality, worth only \$4500,



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which had been paid ; (6) alleged that the machines were not delivered in time, and damages were thereby occasioned to Barber, Sheldon & Co. which they had assigned to the defendant, and he claimed to recoup ; and (7) alleged that the duty imposed by act of congress, had not been paid by the plaintiff.

The plaintiff put in a reply denying the counter-claim.

The cause was tried at the Cayuga circuit, in January, 1866. The plaintiff produced in evidence the contract set out in the complaint, signed by the plaintiff and defendant respectively. The defendant did not sign as the agent or in behalf of the firm of Barber, Sheldon & Co. nor was he described as such in the agreement, nor was said firm mentioned in it. The plaintiff then proved the delivery of all the machinery. The first was delivered 26th September, and the last, 30th November, 1864. It was all taken from the plaintiff's shop by Asa Austin, a cartman, who was sent for it by the defendant, and who was engaged for Barber, Sheldon & Co. The plaintiff applied to the defendant for pay, and received several sums amounting to \$4500 in all, in the checks of Barber, Sheldon & Co. and credited the defendant with the payments. The plaintiff also proved a rise in the value of stock to the amount of \$390.37, and increased tax under the act of congress referred to, \$105.95, and then rested.

The defendant's counsel moved for a nonsuit on the ground that as the proof showed that the machinery was not all ready for delivery, until long after the time specified in the contract, no recovery could be had under the pleadings. The motion was denied, the court saying that if the jury should find the contract had been substantially complied with, they would be instructed to disregard all immaterial variances in respect to time, place and circumstances. The defendant's counsel excepted to the ruling.

The defendant's counsel then offered to prove all the

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facts alleged in the answers, so far as they relate to the question of counter-claim or recoupment; the defendant claiming no damages except such as had accrued to Barber, Sheldon & Co. The plaintiff's counsel objected, and the court sustained the objection, to which ruling the defendant's counsel excepted.

The defendant's counsel in due season, claimed that there were certain questions of fact in the case, which he specifically stated, and requested the court to submit to the jury, but the court overruled the claim and request, and the defendant's counsel excepted.

The court then directed the jury to find a verdict for the plaintiff for the balance due for machinery delivered, \$855.76; for increased price of stock \$423.29, and for additional tax \$105.95, making in all, \$1385, to which direction the defendant's counsel excepted.

The jury found a verdict as directed, and the court thereupon ordered the exceptions taken by the defendant's counsel to be heard at the general term in the first instance, and that judgment be suspended in the meantime.

*Geo. F. Danforth*, for the plaintiff. I. None of the exceptions were well taken. 1. The plaintiff fully proved his cause of action, viz: The making and execution of the contract; the manufacture of the articles contracted; delivery by him in pursuance of the defendant's directions; the acceptance of them by the defendant; the payment of an increased price for the necessary stock; liability to pay the additional tax. *By act of Congress, July 1, 1862, section 75, (U. S. Stat. at Large, vol. 12, p. 46,)* a duty of three per cent was imposed upon the articles in question. The contract in question was made April 8, 1864, and while the above act was in force. *The act of Congress, June 30, 1864, section 94, (U. S. Stat. at Large, vol. 13, p. 270,)* exacted in place of the above three per cent, a duty of five per cent. And by section 97 of the act of 1864, it is

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provided, (quoting section.) The plaintiff came within this provision. 2. The written contract was between the plaintiff and the defendant as principal. (*Auburn City Bank v. Leonard*, 40 Barb. 119.) There was no privity between *Barber, Sheldon & Co.* and the plaintiff. They had, and could have no claim in respect to the machinery, against the plaintiff, and, of course, could assign none to the defendant. 3. There was no question for the jury.

*D. Wright*, for the defendant. I. The court erred in holding that the plaintiff was entitled to recover upon the proof, *as applied to the pleadings*. The complaint counts upon the special contract *only*, and says that "all the machines, which \* \* \* said plaintiff was to furnish and deliver, were in *pursuance thereof*, duly furnished and delivered to the defendant by the plaintiff, and were received and accepted by said defendant, and payment therefor, duly demanded. That is expressly denied by the answer. Upon this issue the defendant was entitled to a verdict. For whereas the contract expressly required that *all* of this machinery was to be furnished "*on or before the 1st day of August next.*" Yet in fact the first was not ready for delivery until the 26th of September, nearly two months after it was due, and the last was not delivered until November 30, 1864, and yet the court decided the plaintiff was entitled to recover the balance due under this contract, *upon these pleadings*. And in this, I submit the court erred. In *Demott v. Jones*, (2 Wall. 9,) Justice Swayne, says, speaking of an action for moneys due upon a special contract, by assumpsit: "He must produce the contract upon the trial, and it will be applied as far as it can be traced. \* \* \* In such cases the defendant is entitled to recoup for the damages he may have sustained by the plaintiff's deviations from the contract, not induced by himself, both as to the manner and the time of performance." (*Van Buskirk v. Stow*, 42 Barb. 10. *Parsons on*

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*Cont. 5th ed. 660.*) The action should have been upon the common counts in *assumpsit*, or if special, should have set out the facts truly. Upon the *pleadings* as they are, the plaintiff must fail.

II. The court erred in refusing to allow the defendant to prove his answers. The machinery not having been delivered in time, the defendant had the right to recoup whatever damages had been sustained. He averred in his answer that he made the contract, as the agent of, and for Barber, Sheldon & Co. and that that fact was known to the plaintiff. But all the machinery had in fact been delivered by the plaintiff directly to that firm; that the moneys paid were paid by that firm; and that that firm had sustained damages by the failure of the plaintiff to perform this contract to \$1800; all this was decided by the court to be immaterial; this most manifestly was an error.

III. But the defendant went further, and alleged that the damages which had been sustained by Barber, Sheldon & Co. had been assigned to the defendant, and he offered to recoup them in this action; his right to do so is very clear. This counter-claim was directly "connected with the subject of the action." (*Code*, § 150, *subd. 2.*)

IV. The court also erred in directing a verdict for the two per cent additional tax. 1. Because the tax had not been paid. 2. Congress does not possess the power thus to vary the contract of the parties. Possibly congress might direct to whom this additional tax should be assessed, but to say that a tax assessed against A. shall be paid to him by B. is beyond their constitutional power.

V. The court also erred in directing the jury to find \$423.29 for rise in price paid for materials, for the reasons stated.

*By the Court*, JAMES C. SMITH, J. The variance between the complaint and the proof in respect to the time

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when the machines were delivered and accepted was properly disregarded by the court. It was not shown, or alleged by the defendant, that he had been misled by it, and the court in the exercise of its discretion, gave instructions to the jury which were equivalent to a direction to find the fact according to the evidence. This the court had power to do. (*Code*, §§ 169, 170.) By the disposition thus made of the point raised, no substantial right of the defendant was prejudiced, and all ground for the motion for a nonsuit was removed.

The claim made by the defendant that Barber, Sheldon & Co. and not himself, were the real contracting parties, and that they had sustained damages by the plaintiff's breach of the agreement, which the defendant claimed to recoup, was untenable. There was nothing in the body of the written agreement, or in the form of the defendant's signature, to indicate that the obligation thereby created, was intended to be any other than a personal obligation on his part. That being the case, parol evidence was inadmissible to show that the agreement was in fact the obligation of Barber, Sheldon & Co. and that the defendant signed it as their agent. (21 *Wend.* 101. 1 *Denio*, 226. 11 *Mass. R.* 27. 21 *Barb.* 17. 40 *id.* 119.) It seems the rule would have been otherwise, if it had appeared in the body of the instrument, or from the signature of the defendant, that he was acting for Barber, Sheldon & Co. and intended to bind them and not himself. (*Auburn City Bank v. Leonard*, 40 *Barb.* 119, 136, and cases there cited by *Johnson, J.*) As the defendant, on the trial, did not claim to recoup any damages except such as had accrued to Barber, Sheldon & Co. by the plaintiffs' alleged breach of the agreement, and as they were not shown to be parties to the agreement, the offer to prove such counter-claim was properly overruled.

The objections taken to the allowance of the additional duty under the act of congress remain to be considered.

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The act of congress, entitled "an act to provide ways and means for the support of the government, and for other purposes," passed June 30, 1864, (13 *U. S. Stat. at Large*, p. 270,) provides "that every person, firm or corporation, who shall have made any contract prior to the passage of this act, and without other provision therein for the payment of duties imposed by law enacted subsequent thereto, upon articles to be delivered under such contract, is hereby authorized and empowered to add to the price hereof, so much money as will be equivalent to the duty so subsequently imposed on said articles, and not previously paid by the vendee, and shall be entitled by virtue thereof to be paid, and to sue for and recover the same accordingly." (§ 97.) It is not questioned that the case in hand is within the provision above transcribed, and the only objections made to the allowance of the claim, are: (1.) That the tax has not been paid by the plaintiff. (2.) Congress has not power thus to vary the contract of the parties, and to direct that a tax assessed against the plaintiff, shall be paid to him by the defendant.

It is clear from the language of the act, that pre-payment of the duty by the vendor is not a requisite to the claim. By section 94, the manufacturer is made liable primarily for the payment of the tax, and this liability makes his claim against the vendee as complete as if he had actually paid. The effect of section 97, is to cast this liability ultimately upon the party purchasing of the manufacturer. No question is made of the power of congress to make the purchaser liable in the first instance, and exclusively, so far as he is concerned. Such is in substance, the effect of the law as it stands. It merely adds to the certainty of collection, and is but one of the means which congress had power to adopt, to accomplish the end designed. It is immaterial to the purchaser, whether the tax is imposed on him directly, or whether it is laid on the manufacturer

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in the first place, and then added to the price. The plaintiff was entitled to have the claim allowed him.

There was no question for the jury, in the case. But the item for increased price of stock as fixed by the jury, under the direction of the court, seems to be larger than the proof warranted, by the sum of \$33.08. If the plaintiff will deduct that sum from the verdict, judgment should be ordered for the balance, with costs; otherwise the verdict should be set aside, and a new trial ordered, costs to abide the event.

Ordered accordingly.

[MONROE GENERAL TERM, September 2, 1867. *J. C. Smith, Welles, and E. D. Smith, Justices.*]

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GORTON vs. KEELER.

In an action for slanderous words, imputing to the plaintiff the crime of perjury, the defendant alleged in his answer, and offered to prove on the trial, that in a certain action theretofore pending before a justice of the peace, the plaintiff was sworn as a witness, and gave testimony material to the issue, which was untrue; and that whatever the defendant said of the plaintiff, had exclusive reference to such testimony. *Held*, that the matter thus pleaded and offered to be proved, was clearly insufficient as a justification, because it did not contain an averment that the plaintiff knew the testimony given by him to be false, or that he testified corruptly. The averment in the answer might be true, and yet the plaintiff be innocent of the crime of perjury.

*Held, also*, that the offer was equally insufficient for the purpose of mitigating damages; mitigating circumstances being those which tend to disprove malice. And that although the circumstances set out in the answer might have had a tendency to induce in the mind of the defendant a belief that the plaintiff had committed perjury, yet that fact not being alleged in the answer, the testimony was properly excluded, when offered in mitigation.

In pleading circumstances, which are claimed to be proper in mitigation of damages, for the reason that they induced the defendant to believe that the charge made by him was true, the fact of such belief, and that it was so induced, is an essential one, and should be distinctly alleged.

51	475
79h	508
51	475
85h	528
51b	475
89ap	526

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But such an averment would be improper in an answer setting up a justification. Such an answer necessarily insists upon the truth of the charge, and it must allege facts showing that the plaintiff is guilty of the offense or disreputable conduct imputed to him. *Per* J. C. SMITH, J.

An answer in mitigation impliedly admits that the charge was unfounded, but denies that it was made maliciously; and when such answer undertakes to set up that the charge was made in a belief of its truth, it must allege, not only circumstances tending to produce such belief, but also the fact that such belief, so produced, existed in the mind of the defendant when he made the charge. *Per* J. C. SMITH, J.

**T**HIS was an action for slander, in charging the plaintiff with having "sworn falsely, sworn to a lie," in an action between the parties, before a justice of the peace, in which the present plaintiff was sworn and examined as a witness on his own behalf.

The answer of the defendant was as follows:

"1st. The defendant denies each and every allegation in the said complaint contained.

2d. For a second and further answer, the defendant alleges that before the speaking of the words alleged in the complaint, and on the third day of November, A. D. 1866, upon the trial of an action then pending before Thomas S. Crosby, Esq. a justice of the peace of the town of Cohocton, in said county, between the said defendant Keeler, as plaintiff, and the said James Gorton as defendant, James Gorton, the plaintiff in this action, appeared as a witness for and on his own behalf, and was then and there duly sworn by the said justice, and took oath to speak the truth, the whole truth, and nothing but the truth, touching and concerning the matters in question in the said issue.

3d. That the plaintiff being so sworn, falsely deposed and gave evidence, among other things, that he, the said Gorton, agreed to work for the said Keeler, and that said Keeler agreed to pay said Gorton for said work \$5 per day; that said Keeler agreed to pay him, said Gorton, \$5 per day for his work; that he agreed with the plaintiff at \$5



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per day; that he, (the plaintiff in this action meaning,) agreed with the plaintiff, (the defendant in this action meaning,) at \$5 per day; that the defendant, Keeler, agreed and promised to pay to him, the said Gorton, for his work and labor, \$5 per day.

4th. That in truth and in fact, the said Gorton never agreed to work for the said Keeler, when the said Keeler agreed to pay him \$5 per day for said work; the said Keeler never agreed to pay the said Gorton \$5 per day for his work; the said Gorton never agreed with the said Keeler at \$5 per day.

5th. That the truth of the matters hereinbefore stated, were material and pertinent to the issue there tried.

6th. That whatever the defendant said of and concerning the plaintiff at the time, and as alleged in the complaint in this action, had exclusive reference to the testimony given by the said plaintiff, on the trial of said action before the said justice, relating to the alleged agreement for \$5 per day, for work as above stated and set forth, and not other or different."

On the trial, the plaintiff proved the uttering of the words by the defendant, as charged in the complaint, when he rested.

The defendant moved for a nonsuit on the grounds:.

1st. That the plaintiff had not made out a cause of action.

2d. That the words proven were not actionable *per se*, without proof of the trial of an action in which the plaintiff had been sworn and testified as a witness. The court denied the nonsuit, and the defendant duly excepted.

The defendant, then offered to prove the facts set out in his answer in justification of the words proven. The plaintiff objected that the facts alleged were not sufficient to allow evidence in justification. The objection was sustained, and the evidence was excluded, to which the defendant duly excepted.

The defendant then offered to prove the facts alleged in

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his answer, in mitigation of damages. The plaintiff objected that the facts alleged were not competent in mitigation of damages. The objection was sustained, and the evidence was excluded, to which the defendant duly excepted.

The jury found a verdict for the plaintiff for one hundred dollars, and from the judgment entered thereon, the defendant appealed.

*Butler & Parkhill*, for the appellant. I. The judge erred in refusing to nonsuit the plaintiff on the ground that the plaintiff had not made out a cause of action. 1. The words proven were not actionable *per se* without proof of the trial of an action in which the plaintiff had been sworn and testified as a witness. (*Vaughan v. Havens*, 8 John. 109. *Crookshank v. Gray*, 20 *id.* 344. *Bullock v. Coon*, 9 Cowen, 30.) 2. The materiality of the testimony given by the plaintiff, in reference to which the charge of perjury was made, should have been shown by the plaintiff to entitle him to recover. (*Roberts v. Champlin*, 14 Wend. 120.) 3. Whether the testimony was material or not, is a question for the court, to be determined from the evidence. (*Power v. Price*, 16 Wend. 450.)

II. The judge erred in charging the jury that "the words that have been spoken are actionable words," it not having been shown that the words referred to material testimony in a trial or other legal proceeding. (16 Wend. 450, and cases cited.)

III. The judge erred in excluding the evidence offered by the defendant in justification of the words spoken. The answer is full and specific, and contains distinct allegations of perjury. The word "*falsely*," as used in the answer, implies malice.

IV. The judge erred in excluding the evidence offered by the defendant in mitigation of damages. 1. The answer was plain and concise, and the plaintiff could not

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reasonably insist that he was misled thereby, or that it did not give him notice upon what fact and circumstances the defendant based his defense. 2. If the facts alleged were not sufficient to constitute a justification, they were certainly sufficient to be urged in mitigation. (*Bush v. Prosser*, 1 *Kern.* 347, and cases cited. *Bisbey v. Shaw*, 2 *id.* 67. *Wachter v. Quenzer*, 29 *N. Y. Rep.* 547.) 3. There is nothing in section 165 of the Code, requiring any notice to the plaintiff, whether the allegations of the answer will be urged in justification or mitigation. (*Code*, § 165. 29 *N. Y. Rep.* 547. *Billings v. Waller*, 28 *How.* 97. *Van Benschoten v. Yapple*, 13 *id.* 97.) 4. The defendant may set up a justification, or he may allege facts short of a full justification, but giving some color to the charge, by way of modification, or he may do both; and in either case he may prove the facts as they are, though they fall short of a justification; and the jury may take them into consideration for the purpose of mitigating the damages. (29 *N. Y. Rep.* 551. 1 *Kern.* 347.)

V. Assuming that notice should be inserted, then objection could be taken only by way of demurrer, upon the ground that want of notice might enable the plaintiff to treat the answer as one in bar, for the purpose of the demurrer. But by going to trial, the plaintiff waived such objection, and if the facts alleged were competent for any purpose, they were admissible. No other objection can be taken on the trial.

*A. M. Spooner*, for the respondent. I. The slanderous words spoken by the defendant amount to a direct imputation of perjury, and any person of ordinary understanding, hearing such words uttered of another, would understand that the speaker meant to charge the crime of perjury upon the person of whom he was speaking; and when the words are such as naturally make the impression upon the mind of the hearer that the party spoken of has

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been guilty of perjury, it is not incumbent upon the party prosecuting, to prove affirmatively that a suit was pending, or that the testimony given by him was material. Here the charge was general, and not in regard to any particular portion of the evidence. Even if the charge be false swearing in any particular portion of the evidence, the defendant must himself show its immateriality if he would escape the consequences of his slander. (*Power v. Price*, 16 *Wend.* 450. *Jacobs v. Fyler*, 3 *Hill*, 572. *Sherwood v. Chace*, 11 *Wend.* 38.)

II. The evidence offered by the defendant on the trial, was properly excluded. 1. It was not competent in mitigation, because it was not alleged in the answer that it would be offered for that purpose; and, 2. It was not allowable in justification, because the answer does not state the plaintiff swore corruptly and willfully false. If the defendant would prove any fact in mitigation merely, he must take his position in the answer, and state the object of the evidence to be in mitigation. (5 *Sandf.* 54, 264, 2 *Kern.* 67.) If intended as a justification, the answer must state facts, which, if true, would make the plaintiff guilty of felonious false swearing. The answer comes far short of that, by omitting to state the plaintiff testified willfully and corruptly false. (*Clark v. Dibble*, 16 *Wend.* 601. 3 *Barb.* 599. 20 *John.* 351. 19 *Abb.* 97. *Bates v. Rosekrans*, 23 *How.* 98, 102.)

*By the Court*, JAMES C. SMITH, J. This is an action for slanderous words imputing to the plaintiff the crime of perjury. The only questions in the case arise upon the offer of the defendant, on the trial, to prove in justification of the charge, and also in mitigation of damages, the facts set out in the answer. The offer was overruled, and, I think, properly.

The substance of the answer is that in a certain suit theretofore pending before a justice of the peace, the

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plaintiff was sworn as a witness, and gave testimony, material to the issue, which was untrue; and that whatever the defendant said of the plaintiff had exclusive reference to such testimony.

The matter thus pleaded and offered to be proved, was clearly insufficient as a justification, because it did not contain an averment that the plaintiff knew the testimony given by him to be false, or that he testified corruptly. In other words, the averments in the answer might be true, and yet the plaintiff be innocent of the crime of perjury.

The offer was equally insufficient for the purpose of mitigating damages. Mitigating circumstances are those which tend to disprove malice. The offer was simply to prove the allegations in the answer. The answer does not aver the absence of malice. It does not allege that by reason of the facts and circumstances set forth, the defendant believed, or had reason to believe, at the time when the charge was made, that it was true. For aught that is alleged in the answer, the charge was made with a deliberate purpose to injure and defame the plaintiff. The circumstances set out in the answer may have had a tendency to induce in the mind of the defendant a belief that the plaintiff had committed perjury, but if they did, in fact, create such belief, the defendant should have alleged it in his answer. Not having done so, the testimony was properly excluded, when offered in mitigation.

This ruling is not a departure from the doctrine of the reported cases. In *Bush v. Prosser*, (1 Kern. 347,) the answer, in stating the circumstances relied on in mitigation, alleged that "whatever was said by the defendant in relation to the matters in the complaint, was said without any malice towards the plaintiff or designed to do him injury in his good name or otherwise, but the same was said in kindness to the plaintiff personally, and

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to the son of the defendant by way of remonstrance, he then being a minor."

In *Bisbey v. Shaw*, (2 Kern. 67,) no question was made as to the sufficiency of the answer. The testimony offered by the defendant, by way mitigation, was received without objection. The questions, on which the case turned, arose on the charge of the judge, and involved the effect to be given to the circumstances proved by the defendant and relied upon by him to mitigate the damages. But the answer went much further than the one in the present case. The facts stated in the answer were, that the plaintiff had secretly and fraudulently taken and carried away corn belonging, in part, to the defendant, under circumstances which induced the plaintiff himself to believe that the taking was larceny; and that he declared that belief by confessing that he had stolen the property. "On these facts" said Ruggles, J. delivering the opinion of the court, "the jury might well have found that if the plaintiff himself thought he had stolen it, the defendant might honestly and without malice have believed so, when he spoke the words complained of as defamatory."

The ruling made at the circuit, if adhered to by the courts, will have a salutary effect in establishing a criterion by which an answer setting up mere mitigating circumstances may be distinguished from one setting up a justification. Under section 165 of the Code, an amphibious form of answer has sometimes been resorted to, under which, at the circuit, the party interposing it, first attempted to prove a justification, and failing in that, claimed that the evidence should be received in mitigation. This practice, if tolerated, would give a defendant the benefit of either defense, or both of them, at his option, without apprising the plaintiff of the ground to be taken against him. To remedy this mischief, the Superior Court of New York city has held in several reported cases, on demurrer, that an answer setting up mitigating circum-

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stances under section 165, must state that they will be given in evidence, solely in mitigation of damages; since otherwise the plaintiff has a right to believe that they are relied on as a bar to his action, and upon that ground may justly demur to them. (4 *Sandf.* 668. 5 *id.* 54, 264.) But with all due respect, there is no warrant for holding that an answer which sets up facts constituting a good defense must also state for what purpose proof of such facts will be offered at the trial. Merely giving a pleading a name, does not fix its character. Under the Code, facts, only, are to be pleaded; their legal effect is not proper matter of pleading. The only test of the sufficiency of a pleading is whether the facts alleged constitute a good cause of action or defense. A partial defense, as well as a complete bar, may be set up in an answer. And under section 165, circumstances, by way of mitigation, (which are a partial defense,) may be pleaded with or without a justification. (*Bush v. Prosser, sup.*) But these two defenses are entirely distinct in their nature, and if the pleader sets out the issuable facts constituting them, and nothing more, neither of them will be mistaken for the other. In pleading circumstances which are claimed to be proper in mitigation of damages, for the reason that they induced the defendant to believe that the charge made by him, complained of by the plaintiff, was true, the fact of such belief, and that it was so induced, is an essential one, and should be distinctly alleged. But such an averment would be improper in an answer setting up a justification. An answer, in justification, necessarily insists upon the truth of the charge, and it must allege facts showing that the plaintiff is guilty of the offense or disreputable conduct imputed to him—but with the motive of the defendant in making the imputation, it has nothing to do. On the other hand, an answer, in mitigation impliedly admits that the charge was unfounded but denies that it was made maliciously; and where such answer

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undertakes to set up that the charge was made in a belief of its truth, it must allege, not only circumstances tending to produce such belief, but also the fact that such belief, so produced, existed in the mind of the defendant, when he made the charge.

The motion for a new trial should be denied.

Ordered accordingly.

[MONROE GENERAL TERM, JUNE 1, 1868. *E. D. Smith, Johnson and J. C. Smith*, Justices.]

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FITZGERALD vs. REDFIELD.

Words imputing to a mechanic want of skill, or knowledge in his craft, are actionable *per se*, if they are clearly shown to have been spoken with reference to the plaintiff's occupation, and the employment is one requiring peculiar knowledge and skill.

In this respect the authorities recognize no distinction between a learned profession and a mechanical trade; and manifestly there is none, in principle.  
*Per J. C. SMITH, J.*

Thus, to utter words charging one who is a mason by trade and occupation, with gross want of skill, knowledge and capacity in his craft, and to say, of and concerning him and his trade, "that he was no mechanic; that he could not make a good wall, or do a good job of plastering; that he was no workman; and that he was a botch," is actionable *per se*.

**A**PPEAL from a judgment entered upon the report of a referee.

The action was for slanderous words uttered by the defendant, of and concerning the plaintiff, charging him with want of skill and capacity in his trade or occupation of a mason. The defendant, in his answer, denied the allegations of the complaint; and for a further and second defense averred, that at the times of the alleged speaking of the words charged in the complaint, and for some time



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previous thereto, the plaintiff was and had been a practical stone and brick mason, carrying on and doing business at the village of Hornellsville, and that during such times the plaintiff had done mason work for the defendant and others, at the village aforesaid and in that vicinity. And that the said mason work done as aforesaid by the plaintiff, was not done in a good, mechanical and workmanlike manner; that the same was poorly and imperfectly done, and that it was generally understood by those with whom the defendant had conversed, and whom he had heard speak of the plaintiff as a mason, that he was not a good mechanic, and that he did not understand his trade and vocation, as a mason, and was not competent to do, and did not do work in a proper, perfect and workmanlike manner. And the defendant, in speaking of the plaintiff as a mason, intended to speak of him truthfully, as he understood his standing and ability in that regard, without any design or wish to injure him in his trade or vocation. All of which the defendant would prove and insist upon on the trial of this action, in mitigation of any damages which the plaintiff might establish against him.

On the trial, before the referee, the defendants' counsel objected to any evidence being given under the complaint, on the ground:

1st. That no cause of action is stated therein.

2d. That no words are alleged to have been spoken which are actionable in themselves; and

3d. That no special damages nor pecuniary are alleged, and asked the referee to dismiss the complaint for the reasons named in such objections. The referee overruled the objections and denied the motion, to which ruling and decision the defendant's counsel excepted.

The referee having heard the proofs and allegations of the respective parties, found the following facts, viz. That the plaintiff is a mason by trade and occupation,

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and has since the month of June, 1862, resided at Hornellsville, N. Y. and carried on his said trade since that time as a means of livelihood. That about the month of June or July, 1865, at Hornellsville aforesaid, a certain conversation was held between the defendant and one Henry S. Frisby, in which the defendant spoke of and concerning the plaintiff, the following words: "That the plaintiff could not make a good wall, or do a good job of plastering, and that he was no workman, and that he had always carried the hod till he came here. That he was a botch." That about the month of February, 1867, at Hornellsville aforesaid, a certain other conversation was held between the defendant and one Andrew Wiles, in which conversation the defendant spoke of and concerning the plaintiff, the following words, viz. "That the plaintiff was no mechanic. That if he, (Wiles,) wanted a good job done, he had better get Dick Pinch to do it, that Fitzgerald was no mechanic, and had done nothing in that line but carry the hod till he came to Hornellsville. That he was not down on him, but he did not want him to impose on the people when he was no mechanic, but only a botch." That about the 10th day of March, 1867, at Susquehanna depot, a certain other conversation was held between the defendant and the said Andrew Wiles, in which conversation the defendant spoke of and concerning the plaintiff the following words, viz. "That if not for Davis, (meaning the plaintiff,) trusting out his work, he could not get any."

That said words were spoken as aforesaid by the defendant of and concerning the plaintiff, and of his occupation as a mason.

The referee found, as conclusions of law, 1st. That said words spoken by the defendant of the plaintiff, and his occupation as aforesaid, were false and slanderous, and uttered with intent to injure him and his said business.

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2d. That the plaintiff in consequence thereof, had sustained damages in the sum of \$50, for which he was entitled to judgment with costs.

Judgment being entered for the plaintiff, in accordance with the report, the defendant appealed.

*Hakes & Stevens*, for the appellant. I. The alleged slanderous words are not actionable *per se*. To say of the plaintiff that he is "no mechanic but only a botch," does not in any manner affect the plaintiff's character. It involves no charge of moral turpitude. It charges no misconduct in his trade or occupation. "To make the speaking of the words wrongful, they must in their nature be defamatory." (*Vicars v. Wilcocks*, 8 East, 1. 17 N. Y. Rep. 54. *Hallock v. Miller*, 2 Barb. 630. *Redman v. Pyne*, 1 Mod. 19. 1 Hill. on Torts, 317. *Jones v. Parde*, 1 Mod. 272. *Tutty v. Alewin*, 11 id. 221.) It necessarily follows that the words must be disparaging to character. It will be seen that in all the cases where words are actionable *per se* by reason of being spoken concerning one's trade or occupation, except the learned professions, or tradesmen whose business it is to buy and sell, the slanderous words in some way affected the character by charging dishonesty or misconduct in the business. In the case of *Fowles v. Bowen*, (30 N. Y. Rep. 20,) the alleged slanderous words charged the plaintiff with dishonesty as a clerk. In this case the court states the rule to be as follows: "Any charge of dishonesty against an individual in connection with his business, whereby his character in such business may be injuriously affected, is actionable." Approving *Van Tassel v. Capron*, (1 Denio, 250.) In that case the plaintiff, who was a justice of the peace, was charged as being a blackleg, and being in a combination to cheat strangers. Judgment was given for the defendant and this rule recognized, viz. "Where words are actionable only on account of the official or professional character of

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the plaintiff, it is not enough that they tend to injure him in his office or calling, but they must relate to his official or business character, and impute misconduct to him in that character." In *Burtch v. Nickerson*, (17 John. 217,) the charge against a blacksmith of keeping false books, implied misconduct. The definition of the term slander *per se*, as stated in the elementary works, that it consists in falsely and maliciously charging another with the commission of some public offense, or the breach of some public trust, or with any matter in relation to his particular trade or vocation and which, if true, would render him unworthy of employment, will not, in the light of the adjudged cases, include this case. The phrase "unworthy of employment," when applied to a mechanic or laborer, must evidently have reference to moral unfitness in connection with the vocation, and not to the relative degree of ability or skill to labor. If otherwise, it would be very unsafe to discuss by comparison or otherwise the relative ability of mechanics to labor.

II. The facts found by the referee, do not authorize the first conclusion of law found by him in his report. The words spoken, as found by the referee, were not false and slanderous, and uttered with intent to injure the plaintiff in his business, as matter of law. The fact that the plaintiff was a mason by trade and occupation does not determine any particular degree of skill or ability as a mechanic of which courts will take judicial notice, either to make a wall or do a job of plastering. The word "botch" when applied to a mason is not a very severe term. It refers to the work done, and not to the person. The other words are words of comparison. Not any of the alleged words imply malice as matter of law. They do not charge the plaintiff with any illegal or immoral act, nor are they sufficiently censorious to base an action of slander upon. (*Hallock v. Miller, supra.*)

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III. The referee, not having found as a fact that the plaintiff sustained any damage, was not authorized to find as he did in his report, that as matter of law "the plaintiff, in consequence thereof, has sustained damages in the sum of \$50." If the words were actionable without any special damage, as matter of law the plaintiff only sustained nominal damages. The statute, (*Code*, § 272,) is imperative that the referee shall find his conclusions of fact and law separately. The referee has complied with this statute. After the referee, who is the court, has declared the law from the facts found, that the plaintiff has sustained \$50 damages, the plaintiff is not at liberty to claim that the court intended something different from that stated in the written report, which is equivalent to a decision of the Supreme Court, to stand as the law of the case until reversed.

IV. The referee erred in denying the motion for a nonsuit, and in overruling the defendant's objections to any evidence being given under the complaint.

*Bemis & Near*, for the respondent. I. The words laid in the complaint, and found proved by the referee, are actionable, *per se*. In the conversation had with the witness Wiles, the defendant, among other things, said, "That the plaintiff was no mechanic, and had done nothing in that line except carry the hod, till he came to Hornells-ville." "That he was not down on him, but did not want him to impose on the people when he was no mechanic, but only a botch. That Wiles had better get Pinch to do the work. That if it was not for his trusting out his work he would not get any." In the conversation with Frisby, the defendant said, "That the plaintiff could not make a good wall or a good job of plastering, and that he was no workman." "That he was a botch." These conversations were directed very plainly to the plaintiff in his *vocation* or *trade* and were clearly so directed with a view to

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prevent his being employed by Wiles and Frisby, and are connected with much other conversation tending to injure the plaintiff in his business, and showing malice. There is no doubt or dispute about the plaintiff's being at the time engaged in carrying on the business of a mason for a livelihood. That is slanderous which spoken of the plaintiff in his business, "may impair or hurt his trade or livelihood." (3 *Black. Com.* 123.) Also, it is slanderous to charge another with "any matter in regard to his trade or vocation, which, if true, would render him unworthy of employment. (1 *Kent's Com.* 628, 9th ed. 1 *Starkie on Slander*, pp. 136, 137.) "The action extends to words spoken of a person in any lawful employment." (1 *Starkie*, 127.) "The humility of the employment or occupation is no objection, either in law or reason, to the action." (*Id.* 128.) "The words are actionable, whether they relate to the plaintiff's honesty, his credit, or the excellence of the wares in which he deals." (*Id.*) The words "He knows not how to make a watch," are actionable. (1 *Mood*, 19.) To accuse a midwife of ignorance, is actionable. (1 *Vent.* 21.) To say a physician is no scholar, is actionable. (6 *Bacon's Abr.* 215.) These cases sufficiently answer the appellant's claim that words, to be actionable, must impute moral turpitude.

II. But special damages are alleged and proved as laid in the complaint. This might properly be shown, either as the gist of the action, or as matter of aggravation. (2 *Starkie on Slander*, 62.) Wiles shows the loss of his work by the plaintiff wholly from the words spoken by the defendant. Frisby's evidence shows the same as to his work. Loss of a customer is special damage. (1 *Starkie on Slander*, 203. 1 *Wend.* 506. 2 *Hill*, 309.) The assertion made by the defendant's counsel, that Wiles and Frisby did not own the lots where the work was done, was without any force, as it could not be material who had title, so long as Wiles and Frisby employed the men, and

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gave out or withheld employment, as they saw fit. As to these parties, it was the work of whoever exercised the power of employing the workmen, as that power was all that was material in this case.

III. *Terwilliger v. Wanda*, (17 N. Y. Rep. 54,) and *Hallock v. Miller*, (2 Barb. 630,) have no application to a case where the words relate to the plaintiff *in his vocation* or trade. Each of these decisions rests upon grounds entirely without force or application in this case.

IV. No exception can be available that the conversation alleged with Frisby took place at a different time from that set out in the complaint. It not being barred by the statute of limitations, "the allegation of time is immaterial." (22 Barb. 87.)

*By the Court*, JAMES C. SMITH, J. The plaintiff is a mason by trade and occupation, and carries on his trade as a means of livelihood. The defendant, at various times, uttered words charging the plaintiff with gross want of skill, knowledge and capacity in his craft, and, among other things, said of him, "that he was no mechanic; that he could not make a good wall, or do a good job of plastering; that he was no workman; and that he was a botch."

The only question is whether the words proved, having been publicly spoken of and concerning the plaintiff, and of his trade, are actionable *per se*. It is claimed by the counsel for the appellant that they are not actionable, as they involve no charge of moral turpitude or of misconduct on the part of the plaintiff in his trade or occupation, and therefore do not in any manner affect his character. But in actions founded on this species of defamation, the question is not whether the plaintiff has suffered in his general reputation; it is whether he has been prejudiced in his employment. It is said by a learned author that if the injurious words clearly relate to the plaintiff, and his

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*occupation*, they are actionable, whether they affect his integrity, his knowledge, skill or diligence, his credit or the subject matter in which he deals. (*Starkie on Slander*, 130.) It is contended, however, by the appellant's counsel that the rule above stated extends only to words spoken of men in their office or profession, and does not apply where the employment is of a mere mechanical nature. But that is not the law. The only distinction between the learned professions and mere mechanical occupations in respect to the nature of the words necessary to maintain the action, is stated by the same author, thus: "Where the office, profession or employment of the plaintiff, requires great talent and high mental attainments, general words, imputing want of ability, are actionable, without express reference to his particular character, for they necessarily include an ability to discharge the duties of such a situation; but where the employment is of a mere mechanical nature, the words, to be actionable, must be applied to it clearly and unequivocally." (P. 136.) The author refers to several cases illustrating each branch of the rule. Thus, on the one hand, it has been held, that to say of a barrister, generally, that he is a "dunce," is actionable, the word dunce being commonly taken to mean a person of dull capacity, who is not fit to be a lawyer. (*Peard v. Johnes*, *Cro. Car.* 382.) So, to say of a physician that he is "no scholar," is actionable, a learned education being considered to be an essential qualification in the medical profession. (6 *Bacon's Abr.* 215.) On the other hand, it has been held that it is actionable to say of an apothecary, "It is a world of blood he has to answer for in this town; through his ignorance he did kill a woman and two children at Southampton;" and to say of a midwife, "Many have perished for her want of skill;" these words being spoken with reference to the particular occupation of the plaintiff, and clearly imputing a want of knowledge, skill or diligence in its exercise.



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In the case of *Redmond v. Pyne*, (1 *Mod.* 19,) the words spoken of a watchmaker were, "He is a bungler, and knows not how to make a good piece of work." After verdict for the plaintiff, the words, on motion in arrest of judgment, were held by the court not to be actionable, not having been laid to, be of the plaintiff's trade; but it was said that had the words been, "he knows not how to make a good watch," they would have been actionable.

Upon authority, therefore, words imputing to a mechanic want of skill, or knowledge in his craft, are actionable *per se*, if they are clearly shown to have been spoken with reference to the plaintiff's occupation, and the employment is one requiring peculiar knowledge and skill.

In this respect the authorities recognize no distinction between a learned profession and a mechanical trade, and manifestly, there is none in principle.

In the present case, not only did the words themselves distinctly refer to the plaintiff's trade, but the referee has found the fact that they were spoken of and concerning the plaintiff, and of his occupation as a mason.

The judgment should be affirmed.

Judgment affirmed.

[MONROE GENERAL TERM, JUNE 1, 1868. *E. D. Smith, Johnson* and *J. C. Smith*, Justices.]

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THE BOARD OF SUPERVISORS OF THE COUNTY OF MONROE, *vs.*  
JOHN L. BUDLONG.

A husband who is ready, able and willing to support his wife, and who gives her no just cause or occasion to abandon him or leave his bed and board, cannot be compelled to support her elsewhere than at his own house or home, if he has one, by any private person, or by the town or county; whether she be sane or insane. His liability for necessities provided by other persons, for her support, rests entirely upon the ground of his neglect or default.

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the said Clarissa Budlong be admitted into the state lunatic asylum, at Utica, pursuant to the provisions of the act aforesaid.

Given under my hand at Rochester, this 16th day of June, 1864."

This was accompanied by the certificate of the county clerk that the person signing the same was county judge of Monroe county, and that the signature thereto was genuine.

To the admission of the judge's certificate, the defendant, by his counsel, objected, upon the grounds :

1st. That it was incompetent and immaterial, as against him.

2d. That he was not a party to, or notified of, the proceedings in which it was made.

But the court overruled the objection and admitted the evidence; to which the defendant duly excepted.

The said certificate was then read in evidence by the plaintiff's counsel.

The plaintiff thereupon offered in evidence an instrument in writing, of which the following is a copy :

"STATE OF NEW YORK, }  
     *Monroe County,* } ss.

We, the undersigned, trustees of the Insane Asylum of the county of Monroe, do hereby approve of the certificate of John C. Chumasero, Esq. in the case of Clarissa Budlong; and we do hereby designate the State Lunatic Asylum, as the proper place to which said Clarissa Budlong shall be sent, and do hereby consent to her being sent to that institution.

H. F. MONTGOMERY,

Dated June 16th, 1864.

E. M. PARSONS."

To the admission of which the defendant, by his counsel, objected, on the same grounds as those above stated in reference to the judge's certificate.

The court overruled the objection and admitted the evidence, and the defendant excepted.

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The said writing was then read in evidence by the plaintiffs' counsel. The plaintiffs then offered to prove by a witness that the defendant and Clarissa Budlong were husband and wife; and that in pursuance of the county judge's certificate, the said Clarissa was received into the insane asylum at Utica, on the 17th of June, 1864; and that the charges for her care and maintenance thereat, with interest on the several sums from the time of the payment thereof to the present time, were \$278.41; and that the same had been paid by the plaintiffs before the commencement of this action. To this the defendant, by his counsel, objected upon the ground that it was immaterial. But the court overruled the objection and the defendant duly excepted. They also proved by the superintendent of the poor of the county of Monroe, that he received notice of examination of Mrs. Budlong, touching her insanity, before Judge Chumasero; it was the usual notice; he thought it was in writing.

Here a statement was read in evidence to the effect that the charges paid by the plaintiffs, to the amount of \$278.41, including interest, were correct and proper charges for the asylum against the plaintiffs, and were the regular and lawful charges.

Thereupon the plaintiffs rested.

The defendant then moved for a nonsuit, and that the complaint herein be dismissed, upon the following grounds:

1st. That the plaintiffs had made out no cause of action against the defendant.

2d. That no notice of the proceedings before the county judge, upon which he had granted the certificate, had been given to the defendant.

3d. That the said certificate was void, because it did not state that the said Clarissa became insane within one year next previous to the date thereof, nor did it state that satisfactory proof had been adduced before him that she had

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become insane within one year next prior to the date of his certificate.

4th. That the defendant was not liable for the expenses incurred, for the reason,

1. That the act of 1842, chapter 135, does not apply to the husband of an insane wife.

2. That no proceedings had been taken to render the husband liable under any statute.

3. That he was not liable at common law. No evidence having been given that the defendant had, at any time, refused or neglected to provide for his wife; or of his inability to do so; or that the plaintiff had advanced any money or necessities upon his credit.

The court denied the motion and the defendant's counsel excepted. The defendant then offered to prove,

1st. That the said Clarissa did not become insane within one year prior to the date of the certificate. 2d. That she was not at the time of the granting of said certificate, or at any time prior thereto, in indigent circumstances, nor a pauper. 3d. That she had at that time and at all times since, a separate property, sufficient for her maintenance and support. 4th. That the defendant was at all times, before and since said certificate and the application therein referred to, able, ready and willing to support and maintain the said Clarissa and take care of her in sickness and in health. 5th. That prior to such application in said certificate referred to, and on or about the first day of April, 1860, the said Clarissa left his house without his consent and against his wishes and remonstrance, and without any cause or provocation, and went to reside at the residence of her son, by a former husband, where she continued to reside until taken to the insane asylum. That she refused to return to him. 6th. That the said son was of abundant pecuniary ability at the time of such removal, and at all times within five years past, to support and maintain the said Clarissa. 7th. That the defendant has, at all times,

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been able and willing to provide for and keep the said Clarissa, whether sane or insane, at his own house. 8th. That no notice was ever given to the defendant, or request made to him, to take care of or provide for his wife, or maintain her. 9th. That he never refused, or declined, or omitted to do so. The court excluded each branch of the evidence, and the defendant excepted, separately to each decision.

The defendant then offered to prove, as a whole, the several facts above singly presented; but the court held and decided that such evidence was inadmissible and excluded the same, to which decision the defendant duly excepted.

It was admitted by the defendant that if the plaintiffs were entitled to recover it should be the sum of \$278.41.

The court thereupon directed the jury to find a verdict for the plaintiff, for the amount above stated, and they thereupon rendered a verdict in favor of the plaintiffs and against the defendant, for the sum of \$278.41; and the court directed the exceptions above stated to be heard in the first instance, at the general term. The plaintiffs to have leave to enter judgment, to stand in the meantime as security.

*D. C. Hyde*, for the plaintiff. I. It was competent for the legislature to provide means for the custody, maintenance and restoration to soundness of mind of all citizens of the state laboring under the visitation of insanity, and to make liable for reimbursement to the county for expenses in the asylum, such relatives as were bound to support them when *out* of the asylum. This was not disputed on the trial. The organic act was passed in 1842, and is entitled "An act to organize the state lunatic asylum and *more effectually* to provide for the *care, maintenance and recovery* of the insane." (2 R. S. art. 2, title 2, ch. 20.) An examination of the whole act is necessary to a proper

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understanding of the questions involved in this case. [This examination is omitted.]

II. It was not the intention of the legislature, that the relatives or friends of that class of insane, contemplated by the 26th and 43d sections, should be *notified* of the application to the judge. If the legislature had so intended it would have provided for it, and the time and manner of such notice. Instead of this, we find that notice is to be given to a public officer, who represents all the people of the county in his official position, and the county is the only party liable to the asylum in cases of this kind. For the purposes of the county and asylum, no other notice was necessary or pertinent. The legislature did not intend that a relative liable for the support of the lunatic, should in any manner be allowed to appear as a *party*, or have a greater voice in the question to be *decided* than the witnesses or neighbors. If it had it would have said so. But, on the contrary, the mode and manner of the whole proceeding is pointed out, and no such party or interference is contemplated. The policy of the law is to investigate the case by competent evidence, and, if made out, to send the lunatic to an institution, prepared, at great expense, by the state, for the restoration of his mind, whether his relatives, or even himself, be *willing* or *unwilling*. The choice and opinion of relatives, have been wisely unprovided for, as the appellant's conduct in this case shows. The legal liability of the county was fixed, and it paid; and it now brings its action to recover for the money paid, of which the defendant has full notice; he has his day in court, and among other things pleads a denial and a divorce. Did the legislature intend that the order of the judge, duly authenticated, should be *conclusive* evidence of the facts therein recited? It would seem so; for that is made the authority on which to receive the patient. The language (§ 26) is imperative, that he *shall* be admitted on such order, and *shall* be supported *at the*

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*expense of the county.* No other or additional evidence is specified. It is the result of the investigation, and is the *highest evidence* that could, in the nature of the case, be produced. *It is the original order itself.* It is a warrant. The asylum cannot go behind the order and deny or qualify it. The steward has no discretion as to whom he shall charge for the support. He can charge only to the county from which the patient is sent. The treasurer of the county has no discretion as to whether he will pay the bills sent him by the treasurer, nor the supervisors, as to whether they will assess and levy the tax. The certificates of the county clerk and the trustees of the insane asylum of the county of Monroe, were both, competent and material evidence, provided the judge's order was competent; the former by the terms of the act aforesaid, and the latter by statute relating to the county asylum. They, also, are the highest evidence of the facts therein stated. This is too plain for argument.

III. The grounds of the motion for a nonsuit were not well taken, because: 1. A cause of action was made out. 2. No notice of the proceedings to the defendant was necessary, as before shown. 3. The statute nowhere requires that the certificate of the judge should state "*in hæc verba*" that the lunatic became insane within one year next previous to the date thereof. The 26th and 43d sections contain all the requirements on that subject. The 41st section requires that he should certify that *satisfactory proof* has been adduced, showing the person insane; and the 43d, that *satisfactory proof* has been adduced that he became insane within a year next prior to the date of the certificate. The *evidence* of insanity and the period thereof, is the *satisfactory proof referred to*. No other certificate of either of those facts is required; and the judge's certificate is full and clear on those points. 4. The defendant is liable, and the act of 1842, *does* apply to him. The defendant as *husband* was bound to support his wife

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out of the asylum when *insane*, as well as when *sane*. No exception is made in favor of the husband. Any person bound to support the insane if *not* sent to the asylum, is bound to pay the county what it had to pay for support while *in* the asylum (§§ 36 and 37.) The 36th section as *applied to this case*, *means* bound to pay the county, as no *relative* or *lunatic* sent by the judge is liable to the *asylum* at all. All the statutory proceedings necessary to render the husband liable, (to the county,) were taken. He was liable at common law for her support, when out of the asylum whether sane or insane, and if insane her absence from his house *would not excuse*. Whether the defendant had neglected or refused to provide for her, or whether he was able, or the fact that the county did not advance or pay upon his credit, were matters of no importance. The wife was insane, having no judgment, volition, or moral responsibility; and the common law rules in relation to the liability of the husband, are not so monstrous as to bind him for support when she least needs it, and absolve him when she most needs it. Here was a necessity for which the husband could not provide. The state undertook it and made the several counties liable in the first instance, with a remedy over against the husband. It was a high necessity, infinitely above all merely animal wants. Was not this in effect an application of the husband's common law liability for a new want? What are to be deemed necessities, must depend upon the degree of civilization. It is high time the law should raise its standard as the age is already a century in advance of it. But the husband was not notified of the proceedings. What if he had been? Could he build an asylum in a day, and meet the necessity? It is an idea descended from barbarism that the wife is his servant or slave, and cannot be cared for at his expense in so great an exigency, without notice to him. Suppose he had been in California, or unknown. Are the rights of a whole people to be suspended until he



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appears. In different proceedings, and by other statutes where notice is provided for, the notice is given to the party primarily liable, but, in this the defendant is not primarily liable.

IV. The first, second and third offers of the defendant were properly excluded. The judge's certificate was conclusive evidence on all those points. If it was open to contradiction in one respect, it was in all; and the question of insanity, *itself*, might have been tried and a verdict rendered against the certificate, even though it had been founded on the *verdict of a jury* before the judge. The offers numbered from four to nine were each and all properly excluded, if the foregoing views of the policy of the law are correct.

V. The design and meaning of the act is that an application to the judge may be made by any one, and an investigation of the question of insanity be had without notice to any person, except the officers therein named, and if the person, on whose behalf the application is made, be an indigent insane, not a pauper, and such insanity has occurred within one year next prior to the application, such person may be sent to the asylum at the expense of the county; and any person liable to support the patient out of the asylum, shall be liable to reimburse the county for the lawful expenses paid by it on account of the patient while in the asylum; the limited period fixed by law. By the act of 1842, the legislature recognized the fact that the asylum was a necessity of modern civilization, and knowing that no individual could provide the requisite means at home, gave the county the right to reimburse itself from the relative liable for the patient's support, as fully and completely as though the necessity had been food, clothing or medical attendance. It merely recognized the fact that the mind is as precious as the body; and, that a claim for the restoration of deranged intellect, is as good as a claim for bread. It did not rise

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above the actual wants, or the average intelligence of the age. It did not infringe individual rights, any more than the law relating to the persons and estates of drunkards and idiots, or the sanitary laws. It conceived the rational idea, that a part of the insane might be cured, and that a proper place was a necessity. The course of proceeding is and ought to be summary, simple and efficient, and is not void, merely because the husband is not notified of the first step, or made a party to it. The liability of and payment by the county is only one of the conditions of his liability to the county. The defendant may show that he is not a relative, that he is a divorced husband; that he is not a relative of that degree who is liable; he may deny payment and many other things. He is not made liable except by a judgment, and by *due course* of law. The overseers of the poor of the town, had notice as well as the county superintendent. The defendant would have been liable to the town, if the town was liable for support, had the town furnished it without notice. They are not required to give notice before they give relief. The defendant on the trial did not claim that the act of 1842 was unconstitutional or void in any of its parts, but that the proceedings were inoperative as to him for want of notice. This is a mistake. If the act is unjust, (which we deny,) redress may be had in a proper tribunal, but notice in such case can never be required by a court, except upon the principle of judicial legislation.

*Geo. F. Danforth*, for the defendant. I. The court erred in denying the defendant's motion for a nonsuit. The plaintiffs had made out no cause of action. 1. There was no pretense that any liability was established at common law. 2. The complaint and course of trial shows that the plaintiffs' claim to recover was placed upon the provisions of the act of 1842, *ch.* 135, and that of 1850, *ch.* 282, and especially sections 26 and 36 of the first act, and section

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2 of the act of 1850. But the action cannot be sustained by them. Those statutes embrace, within their provisions, (so far as this case is concerned,) only "*indigent persons, not paupers.*" (*Act of 1842, ch. 135. Act of 1850, ch. 282.*) Clarissa Budlong was not of this class. As wife, she partook of the estate of the husband, his whole estate being chargeable with her support. *Norton, &c. v. Rhodes*, (18 Barb. 100,) was an action by superintendants of the poor against a husband. He had maltreated her and expelled her from his house without just cause; he refused to provide for her, though of sufficient ability to do so. The plaintiffs regarding her as a pauper, had furnished her with "boarding, clothing and medical aid," and then sued the husband. A justice of the peace had given them a judgment. The county court reversed it. The Supreme Court, eighth district, at general term sustained the county court. MARVIN, J. saying: "In my opinion there is no principle upon which this action can be sustained."

In the case before the court, the complaint alleges that the husband, this defendant, "*at the time of such apprehension of his wife, was, ever since has been, and now is, a man of considerable means, and abundantly able to support and maintain his said wife.*" The answer states also, that, "At the time and times when the said board, maintenance, support, goods and merchandise, and other articles were furnished the said Clarissa Budlong, and expenses incurred on her account, as stated in said complaint, this defendant was a householder in the town of Perinton, in said county, and was amply provided with the means and conveniences to maintain and support the said Clarissa in a manner suitable to her condition, and was ready and willing so to do." And upon the trial, the plaintiff proved, by Mr. Hill, who was the son of Clarissa, and had known the defendant for thirty years, that during all this period he was "worth about \$8000," having a farm which he carried on, and where he lived. This fact,

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established by the record and by proof, shows: That the county judge had no jurisdiction; that the plaintiffs' claim was destitute even of an apparent foundation; and no other evidence was introduced which had a tendency even to charge the defendant. The plaintiff relied upon the certificate of the county judge, and the certificate of the trustees of the Monroe county insane asylum. 3. These certificates have no force other than that given to them by the statute, and must be confined in their operation and effect to the special purposes contemplated by the law authorizing them. This purpose is to entitle her to admission into the asylum to be supported there at the expense of the county, not exceeding two years, (§ 26, p. 148, *Laws of 1842*,) and enables the officers of the asylum to collect of the county such expense. (§ 37, *id.* p. 150.) They are not made evidence, and cannot be used as such for the purpose of establishing the liability of a person not a party to the proceedings of which they form a part. (1 *Wash. C. C. Rep.* 216. *Wheeler v. Farmingham*, 12 *Cush.* 337.) "It is a most obvious principle of justice that no man ought to be bound by proceedings to which he was a stranger." (1 *Greenl. Ev.* § 522.) At most they could be received only to show that what the plaintiffs had paid, they paid in pursuance of a valid claim by the asylum, or to fix the amount of damages after the liability had been otherwise established. (*Burrell v. West*, 2 *N. H. Rep.* 190, 192, 193.) But they cannot prove the facts upon which the certificates were founded. (*Sanders v. Hamilton*, 2 *Hayes*, 282. 2 *Starkie on Ev.* 183, 184. 2 *Cowen & Hill's Notes*, p. 321. *Beal v. Beck*, 3 *Har. & McHenry*, 242. *Drummond v. Pressman*, 12 *Wheat.* 528. *Clark v. Montgomery*, 23 *Barb.* 464, 471.) Even when one has the right of recovery over, secured to him, either by express contract or by operation of law, the judgment against him is of no avail, unless he has given notice of the suit to the person so responsible. (2 *Cowen*

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§ *Hill's Notes*, pp. 817, 818.) Notice of some kind must be given. In *Kilburn v. Woodworth*, (5 *John*. 39,) which was an action of debt, upon judgment, the court say, "To bind a defendant personally by a judgment when he was never personally summoned or had notice of the proceeding, would be contrary to the first principles of justice."

In *The People v. Soper*, (7 *N. Y. Rep.* 431,) the Court of Appeals say, "There is nothing which our law denounces more explicitly than an adjudication of the rights of a party without offering him an opportunity of being heard in his defense." In *White v. Evans*, (47 *Barb.* 179,) a record had been introduced to which the plaintiff was not a party. Upon appeal, the court say, "He," the opposite party, "offered a judgment record in evidence. The plaintiff in every suitable form objected to its admissibility and its sufficiency as evidence against him, substantially upon the ground that he was not a party to it or affected by its contents; and this is an elementary principle; he was neither a party nor a privy thereto. It is said he could not be a proper party thereto. This may be, and what then? Why, that the defendant, *if he found it necessary to prove certain facts* alleged in that record, must prove them by original and independent evidence. The record was, therefore, either improperly admitted as evidence, or pronounced to be sufficient evidence against the plaintiff." So in a proceeding under the poor law, (*Adams v. Oaks*, 20 *John*. 280,) the court say: "In directing the distress warrant to issue in such a case against the overseer of the town properly chargeable, the statute is silent as to previous notice by summons; but on common law principles, such notice is held to be necessary before the overseer can be personally charged by process in the nature of an execution."

II. The plaintiffs did not establish that the defendant was "legally liable" for the support of his wife at the asylum,

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as required by section 36 of the act of 1842, and section 2 of the act of 1850.

1. These sections must be construed in connection with other statutes relating to the same general subject, viz: Revised Statutes, chapter 20, entitled "Of the Internal Police of the state," part 1, title 1, entitled "Of the Relief and Support of Indigent Persons," page 565; title 3, of the same chapter, entitled "Of the Safe Keeping and Care of Lunatics," page 634. Chapter 135 of laws of 1842, above referred to, is entitled "An act to organize the State Lunatic Asylum and more effectually to provide for the care, maintenance and recovery of the insane," page 141, and chapter 282 of the Laws of 1850, is entitled "An act in relation to the State Lunatic Asylum," page 619. These are, as believed, all the statutes which have any bearing upon the question at issue; and in none can any authority be discovered for the present action. Sections 4 and 13, of part 1, title 3, chapter 20, Revised Statutes, extended the remedies in favor of the overseers of the poor against the committee of the estate of the lunatic; and section four permitted the overseers, in default of the relatives or committee to care for the insane person, "to confine him in the county poor house, or in any public or private asylum approved by the supervisors." This was the whole statute law touching the duties and the liability of any person for the care of the insane, as it stood previous to the act of 1842, chapter 135, above cited. The certificate recites that the judge in granting the certificate acted under chapter 20, title 3, but it was not authorized by it. The act of 1842 organized the State Lunatic Asylum at Utica, and by section 20, the provision last cited, in section 4 of title 3, chapter 20, was so modified that in cases provided for by title 3, above cited, no insane person could be confined in any place by order of the overseers, except this asylum, "or such public or private asylum, as the supervisors should direct," in effect, prohibiting confinement in the

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county poor house. By the same section, superintendents and overseers of the poor are required to see that this provision is carried into effect, "as well in case the lunatic or his relatives are of sufficient ability to defray the expenses, as in case of a pauper." It cannot be claimed that in any respect, the provisions thus far cited, lend any strength to the plaintiffs' case. The provisions of the act of 1842, only supplement the provisions of the Revised Statutes upon this subject. Under these statutes certain persons, called relatives, may be charged with the expenses of the care and maintenance of the insane person. Those relatives do not include a husband. "A husband," says Lord Loughborough, "is not of kin to the wife, nor she to him." (3 *Vesey*, 247. *Pomeroy v. Wells*, 8 *Paige*, 410.) But those named and chargeable, can only be made liable by legal proceedings, taken upon notice to them by the overseers of the poor.

The remaining inquiry, upon this branch of the subject is whether there are other provisions of the law which make a person, not so named, liable—and make him liable without legal proceedings and without notice. Section 25 of the act of 1842, permits each county to have one, and upon certain contingencies, more than one "indigent insane person in the asylum, whose disease at the time of admission was the first attack and did not exceed six months"—such patients to be designated by the superintendents of the poor. Section 26 indicates the proceedings necessary to procure the admission of this class of persons, viz: Application in his behalf to the first judge of the county; a trial with or without a jury; a certificate; whereupon the supervisors are to provide for his expenses.

By the act of 1850, chapter 282, page 619, section 2, it is provided that "no person in indigent circumstances, not a pauper, shall be admitted into the asylum on the certificate of a county judge, made under section 26, of the act of 1842, unless such person has become insane within one

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year prior to the granting of such certificate." The proceeding before him is to be upon notice. It is made the duty of the county judge, upon an application under the 26th section, to cause reasonable notice thereof, and of the time and place of hearing the same, to be given to one of the superintendents of the poor of the county chargeable with the expense of supporting such person in the asylum, if admitted. Or if such expense is chargeable to a town or city, then to an overseer of the poor of such town or city, as he may judge reasonable under the circumstances. He shall then proceed to inquire as to the time when such person became insane, and shall, in addition to the requirements of the 26th section of the act of 1842, state in his certificate that satisfactory proof has been adduced before him that such person became insane within a year next prior to the date of his certificate. Section 36 provides for payment of the expenses of the lunatic in the first place by the county, and then adds: "Said county, however, shall have the right to require any individual, town, city or county that is legally liable for the support of such patient, to reimburse the amount of said bills with interest."

2. The liability here referred to is in terms "legal liability," and means one established by some adjudication, as under the Revised Statutes the liability of a relative or a committee after notice and an opportunity to be heard before a court of sessions, or that of a town or city whose overseer of the poor, had under section 2, of the act of 1850, been notified of the proceedings before the county judge, or perhaps that of an "individual" who had been notified under section 2, of title 1, chapter 20, before cited. The acts of 1842, and of 1850, so far as the sections in question are concerned, are amendatory of title 3, chapter 20, part 1, Revised Statutes, (vol. 1, 634.) They are *in pari materia*, and are so considered in *Perkins v. Mitchell*, (31 Barb, 472.) The "individual" referred to in section 37, act of 1842, is the "individual" referred to in section 2, title 1, part 1,



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chapter 20, page 566, volume 1, Revised Statutes, and introduced by adoption into section 3, title 3, page 487, volume 1, Revised Statutes; and so understood, the whole series of statutes become coherent and just, for that individual has fourteen days' notice of proceedings "to compel him to maintain such mad "person." Thus the letter and spirit of the law will be satisfied. If it means any other individual than one entitled to such notice, the act is so far invalid. The act should, if practicable, be so construed that it will not violate any constitutional provision, or any common principle of justice. (*Denio, J. 18 N. Y. Rep. 213.*) The construction contended for, prevents such violation. If the intention of the legislature had been to extend liability to a class not already by statute subjected to the duty, or to introduce a class to be made liable without the proceedings which protected those already enumerated, it is reasonable to presume such intention would have been expressed in clear and unmistakable language. No such intention appears either expressly or by implication. If, however, this position is deemed erroneous, the words "legal liability" could only be satisfied by a common law liability made out by appropriate evidence of (1.) A contract; or (2.) A refusal or neglect to perform some duty. In no other way could a cause of action accrue against the defendant, or he become legally liable.

3. There was no legal liability on the part of the defendant to support his wife at the Insane Asylum, or privity of contract between himself and the plaintiff. He was entitled to her custody. It did not appear that he had ever refused or neglected to provide for her; or that he was unable or unwilling to do so. The duty did not exist on the part of the defendant to place his wife in the lunatic asylum. His omission to do so, therefore, does not place the plaintiffs in the condition of one who renders a service for another's benefit. The statute does not require a husband to place his wife in a lunatic asylum. Nor does it authorize

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the commitment of a wife to such asylum without her husband's consent. It must be considered as settled, that the husband is bound only to make suitable provision for his wife at his own house, and if she willfully abandons him, she carries with her no credit of the husband, and can impose on him no liability. Nor is he bound to make provision for her elsewhere. (2 *Kent's Com.* 146, 4th ed. *Cromwell v. Benjamin*, 41 *Barb.* 560. *Pomeroy v. Wells*, 8 *Paige*, 406. *McGahay v. Williams*, 12 *John.* 292. *McCutchen v. McGahay*, 11 *id.* 280. *Blowers v. Sturtevant*, 4 *Denio*, 47.) To render the defendant legally liable—if the plaintiffs could in any event recover—they must make out a case within the above principle. If they failed to show the husband in default, then they could not recover. (18 *Barb.* 101.) Or, assuming that the statute in question can, under any circumstances, be made applicable to a husband, it can only be after notice; and as to necessity, the above authorities and the principle which they recognize, are decisive.

4. The certificate was void, because it did not conform to the statute. (*Laws of 1850, ch. 52, p. 619.*) It did not appear that the said Clarissa "had become insane within one year next prior to the granting of such certificate." That was a jurisdictional question—no other person, however insane, could be made the subject of such an investigation. Nor does his certificate state that satisfactory proof had been adduced before him that "she became insane within a year next prior to the date of his certificate." It reads, "Clarissa Budlong was insane, and that said insanity occurred within one year from the date hereof." This certificate may be true, and Mrs. Budlong have been insane for five or ten years. "Said insanity" is satisfied by a new development within the year; but the statute means a first attack, or beginning of derangement. The language of the statute must be strictly followed. In *Fitch v. Commissioners, &c. of Kirkland*, (22 *Wend.* 135,) the court say: "When a statute prescribes the form, the very words

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of an order or other necessary proceeding thereunder, must be used."

III. The evidence offered by the defendant should have been received. It would, if received, have established: (1.) "That Clarissa did not become insane within one year from the date of the certificate. (2.) That she was not in indigent circumstances. (3.) But, on the contrary, then had a separate property sufficient for her maintenance and support." These facts would have established that *she* was not within the statute, nor the object of its charity; and that over her the county judge had no jurisdiction. (4 and 7.) "That the defendant then was, and at all times had been, able, ready and willing to support and maintain her in sickness and in health, and to provide for and keep her, whether sane or insane, at his own house. (5.) That prior to the application referred to in said certificate, and on or about April 1st, 1853, she left his house without his consent and against his wishes and remonstrance, and without any cause or provocation went to reside at the residence of a son by a former husband, where she continued to reside until taken to the insane asylum. That *she* refused to return to him. (6.) That the son with whom the said Clarissa was living at the time of the application to the county judge, was of abundant pecuniary ability to support and maintain her." This would have shown a *relative*, liable, within the statute. (7.) "That no notice was ever given to the defendant, or request made to him to take care of, or provide for his wife, or maintain her. That he never refused, or declined, or omitted to do so." These facts would have established an entire absence of liability under the statute above referred to. The result of the rulings above complained of was: (a.) The defendant was condemned in a proceeding of which he had no notice, without a trial, without evidence, and without an opportunity for defense. (b.) He was held liable for the

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support of a wife who had voluntarily eloped from him, and for whom he had made abundant provision in his own house. There is nothing in the law which affords a pretense or shadow of excuse for such injustice.

*By the Court*, E. DARWIN SMITH, J. Upon the evidence given at the trial, and that offered by the defendant and excluded, it is difficult to see upon what principle the verdict for the plaintiff can be sustained.

Upon such evidence, assuming that the defendant could have proved what he offered, it appears that the defendant's wife, prior to April 1, 1860, without cause and without consent on his part, and against his remonstrance, deserted his bed and board and went to live with her children by a former husband, and continued thereafter to live with said children, one after another, till she was taken to the insane asylum, on or about the 17th day of June, 1864; that her husband was a man of property, worth at least \$8000, and at all times willing to provide for and support her in a suitable manner, at his own house or in the insane asylum, if it were necessary or fit that she should be sent to any such asylum.

How, under such circumstances, he can be made responsible in this action for her support in the insane asylum, I cannot conceive.

These facts show that she was not a proper subject for the exercise of the power of the county judge to execute the certificate prescribed in and by section 26 of the act to organize the State Lunatic Asylum, passed April 7, 1842, as the same has been since modified by subsequent statutes.

This certificate is an adjudication *in rem* upon the subject to which it relates, and is probably *prima facie* evidence of the existence of the facts asserted therein, as against all persons notified to attend the hearing and investigation before such judge.

The county, through the superintendent of the poor,

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the overseers of the poor of the town of Perrinton, and the sons-in-law of the lunatic, (Hill and Staples,) having been duly notified to attend such investigation and actually appearing before the judge on such hearing, would be concluded by such certificates. They, or either of them, if dissatisfied with it, might have brought a certiorari to this court to review and reverse the same.

The statute does not declare what shall be the force or effect of such certificate as evidence, or whom it shall bind, and it must, therefore, stand upon the same basis with all other judgments or adjudications. It must bind those who were parties and privies, to the proceeding, and had an opportunity to litigate the questions involved in such investigation and adjudication. No one else can be bound by this certificate.

It is a fundamental rule of law, and of common justice, that no one shall be concluded by a legal judgment, decision or adjudication had or made in any suit or proceeding to or in which he was not a party or privy and of which he had no notice, or in respect to which he had no opportunity to defend himself, or to litigate the question involved, or upon which his liability depended. The jurisdiction of all courts and officers exercising judicial functions is open to investigation, question and inquiry, whenever their proceedings are set up or sought to be enforced; and when there is no jurisdiction, such proceedings are absolutely void. (7 *N. Y. Rep.* 431. 23 *Barb.* 598. 45 *id.* 393.)

If this certificate, therefore, was *prima facie* evidence of the facts, it recites and affirms, or finds, it could not be conclusive on the defendant, and he was clearly entitled to disprove the facts alleged or stated therein, upon which the jurisdiction of the judge depended. It was error therefore, I think, to overrule most of the offers made by the defendant's counsel on the trial. They went to disprove jurisdiction, and to show that the alleged lunatic had not become insane within one year next prior to the granting of

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such certificate, as required in section 43 of the said statute as modified in 1850, and that she was not an indigent person, but was possessed herself of a sufficient separate estate for her support, and that her husband and children were each persons of wealth, and abundantly able to support her. Proof also that his wife deserted his house without cause and against his will, and that he was at all times able and ready and willing to support her in a proper manner, should, I think, have been received.

It seems to me that this proof, of itself, would have established a complete defense to the action. A husband who is ready, able and willing to support his wife, who gives her no just cause or occasion to abandon him or leave his bed and board, cannot be compelled to support her elsewhere than at his own house and home if he has one, by any private person, or by the town, or county, whether she be sane or insane. His liability for necessities provided by other persons for her support, rests entirely upon the ground of his neglect or default.

The law has nothing to do with his domestic relations while he performs his proper duties in the support or care of his wife, and is free from all neglect or misconduct in respect to her, or is ready, willing and able to discharge all his proper duties to her. This proceeding before the county judge, it seems to me, was entirely unauthorized. The lunatic was not in a condition to give the overseers of the poor any jurisdiction, to interfere with her at the expense of the defendant. Certainly not till they had applied to him, and he had refused to take proper care of his wife and provide for her support in a manner conformable to her condition and his ability.

I think a new trial should therefore be granted, with costs to abide the event.

New trial granted.

[MONROE GENERAL TERM, September 7, 1868. E. D. Smith, Johnson and J. C. Smith, Justices.]

## RAYNOR and others vs. TIMERSON.

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7th

R. and T. being adjoining owners of land, T. called upon R. in reference to building a line fence. R. being a cripple, unable to leave his house, and not knowing where the boundary line between them was, sent T. to B. to have the latter point out the line, saying that B. knew where the line was. B. accordingly pointed out the line to T. who built a fence there, and from year to year improved his land up to the fence. The evidence showed that R. never knew where the line had been pointed out or located, nor what T. had done in the way of fencing and improving the land. It turned out that B. did not know where the line in fact was, and pointed out the wrong line. *Held* that upon these facts the elements necessary to create an *estoppel in pais* were entirely wanting.

*Held, also*, that T. was as much bound as R. to know where the true line was, between the two lots, and that B. was as much the agent of T. as of R.

*Held, further*, that as it did not appear from the case that there was any difficulty in ascertaining the true line, by survey and measurement, it was not a case where the line was uncertain, and difficult to discover, but a case where T. instead of taking any steps to ascertain, chose to take the word of B. and thus, by the mistake of the latter, an erroneous line was located and the division fence built upon it.

That R. not knowing where the location was made, nor that T. was making improvements upon the land on his side of the line fence, he was not called upon to speak, or to give notice; and his silence, under the circumstances, implied no acquiescence in T.'s proceedings, and no wrong.

There is no case to be found where an erroneous boundary line, established under such circumstances, has been held binding and conclusive on the ground of *estoppel in pais*, short of twenty years' possession under claim of title. *Per JOHNSON, J.*

The mere circumstance that one has made improvements upon the land of another, under an honest, but erroneous belief that he was the owner, forms no ground for transferring the title of one person to another; nor for estopping the owner from reclaiming his own. *Per JOHNSON, J.*

Possession and claim of title under an erroneous location, short of twenty years, is not sufficient to establish title in the occupant, as against a valid paper title; unless such location was made, and the possession under it has been continued, under such circumstances as to estop the party having the paper title from asserting his claim against such occupant.

An exception to a single word, in a sentence of the judge's charge, which has no bearing upon any issue, or question in the case, will not be allowed or entertained.

**T**HIS is an action of ejectment brought by the plaintiffs, as heirs at law of John M. Raynor, deceased, to recover six acres of land from the defendant.

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*Raynor v. Timerson.*

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The parties derive title from the same source, viz. Baltus Lingenfelter. The plaintiffs' title begins in 1824, and the defendant's in 1829. The plaintiffs derive title through Aaron Putnam; the defendant through Oliver Blanchard. Putnam's deed calls for twenty-four chains fifty-nine links length of line east and west. The defendant's and Blanchard's deed laps on the plaintiffs' line so as to leave them but nineteen chains and ninety-one links. A line fence was built between them at the point called for in Blanchard's deed, by Blanchard, and remained there twenty-five years, as the line. In 1853 the defendant took the title and entered into possession of the premises occupied by Blanchard, and without any survey being made. This line fence, as built by Blanchard, was then there. Raynor, the second year after the defendant purchased, wanted the latter to unite with him in building a new line fence, because the old one was insufficient to turn cattle, and asked him to send for Almar Blanchard for him to mark out the line to build the new fence on, for he (Blanchard) knew where the line was. Blanchard came and pointed out the line. Raynor had his son and Coalman, his hired man, present. The fence was built by Raynor and Timerson on the line pointed out by Blanchard, and after it was built, it was divided by them. At the time this fence was built, it was a swamp on both sides, and after the fence was built the defendant cleared up his land to this fence, and made great improvements; he cleared and ditched the swamp. Two years after this fence was built, and in 1857, Raynor sold and conveyed to Timerson nine acres immediately west of this line fence. Raynor in his deed describes these nine acres as follows: "Beginning at the northeast corner of lands owned by party of the first part, (Raynor,) and by the line fence, &c. These nine acres were ran out by a surveyor, who commenced at this line fence, and the surveyor reported the survey to Raynor. A line fence was then built on the west line of these nine acres



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by Raynor and Timerson, and the fence first built by Raynor and Timerson was removed. Timerson then went on and made valuable and permanent improvements on these nine acres, ditching, clearing, &c. Timerson never heard or knew of there being any dispute about the line till after Raynor's death, which was August, 1863. The jury found a verdict for the plaintiffs, for the land lying east of the line fence built in 1855 by Raynor and Timerson, running six chains and seventy-six links east, &c. and located the nine acres according to the deed, starting from this line fence west.

The judge thereupon ordered the exceptions to be heard in the first instance at the general term, and all proceedings on the verdict to be stayed.

*D. Wright*, for the plaintiffs. I. The paper title is in the plaintiffs. That fact is not disputed.

II. Putnam was in possession when Blanchard received his deed, and although Blanchard's deed was first recorded, Putnam's possession was notice of whatever rights he had under his deed. (*See authorities cited on 6th point.*)

III. The deed from Lingenfelter to Blanchard, is pretended to have been made after an actual survey, and yet it makes the north line of the sub. 36.50 chs. whereas Lake, the defendant's surveyor for this trial, makes the south line but 34.18 chs. and the angles are all right angles. Blanchard's east line is made 38.50, when no surveyor has ever found more than 36.50 chs. In running upon Putnam's land, the first line is north 11.10 chs. Lake and all the other surveyors, make this line but 10 chs.; the next line is made west 14.10 chs. and the next, running west, is made 5.80 chs. making for the two westings 19.91 chs. whereas Lake makes the two 17.83 chs.; nor are the eastings any more nearly correct, as shown by all the surveyors. From all this it is possible that the jury came to the conclusion that all the testimony of Oliver Blanchard and

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of Benjamin Blanchard, in regard to an actual survey, was fallacious, as it doubtless was, and that may have had some influence upon their minds in regard to other matters testified to by these two witnesses. It was at least sufficient to compel the jury to disregard the calls of that deed, and the defendant has no other under which he could claim title for twenty years.

IV. The questions between these parties, being strictly questions of fact, unless some error has been committed by the court, the verdict is conclusive.

V. The first exception taken was "to that part of the charge wherein his honor charged, with regard to the recording of the deed and its legal effect." This was unaccompanied by any request to charge. The charge given upon that subject was correct. (*Tuttle v. Jackson*, 6 Wend. 213. 4 Kent's Com. 179.)

VI. The next exception is to that part of the charge wherein the court charged "that the possession to be adverse must be peaceable." The defendant's counsel seizes upon this one word "peaceable," upon which to hang an exception. The exception must fail for the following reasons: 1st. There was no request to charge differently. (*Carpenter v. Stilwell*, 11 N. Y. Rep. 79.) 2d. The whole charge taken together was entirely correct. 3d. Whether the word "*peaceable*" be in or out of the charge, could not possibly affect the defendant. The possession of the defendant was eminently "peaceable," so far as it extended; nor is there one word in the testimony to the contrary; and hence the defendant could not have been injured by the error if one had been committed. For what constitutes an adverse possession, see *Lane v. Gould*, (10 Barb. 256,) and compare the charge as given upon this subject, upon the trial of this cause with what is there said upon the same subject, and it will readily be seen that the defendant had no reason to complain.

VII. The next exception is to that part of the charge

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wherein the court instructed the jury that, "If the location made by Almar Blanchard was erroneous, and Raynor was ignorant that the mistake had been made by Blanchard, and was ignorant of the subsequent improvements by Timerson, then the plaintiffs' title is not cut off, and they are not now estopped." In lieu of this the defendant asked the court to charge the jury that, "If they find that Almar Blanchard was the agent of Raynor to locate the line, and did so locate it, and the defendant and the plaintiff *each* acted upon it, and the defendant made improvements in consequence of it, then the plaintiff is estopped." Such never was a *legal* principle, and there is no equitable defense set up in this case. It has been held in equity, that where the person having the legal title stands by and sees the party in possession honestly making permanent improvements upon the land, and neglects to speak, he shall ever after hold his tongue; unless he will first make compensation for the improvements thus made. But I submit that it never has been held that the party thereby lost his legal title by estoppel. The defendant also requested the court to charge, "that if the line agreed upon and fenced by Raynor through an agent, and the defendant agreeing to it, and making permanent improvements upon the land up to the fence, then the plaintiff, after the lapse of a number of years, is estopped from interfering with that line, whether he knows of the improvements being made there or not." It is difficult to understand how the making of improvements by the defendant, could form an element in causing an estoppel on the part of the plaintiff, while he was ignorant upon the subject. There are two sufficient answers to this exception. 1st. The charge as made, was altogether wrong as against the plaintiffs, and much too favorable to the defendant. The title to real estate cannot be thus conveyed. If a line can thus be established by parol, the length of time, short of twenty years, is not an element in *any degree*, constituting the

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estoppel. If there be any estoppel, it is by virtue of an *executed* agreement, and that doctrine I deny in toto, when offered as a *legal* defense. There may be cases wherein equity would interpose between owners of adjoining lands. The true rule upon this subject is laid down in *Terry v. Chandler*, (16 *N. Y. Rep.* 354,) and in the opinion of Porter, J. in the case of *Vosburgh v. Teator*, (32 *id.* 566.) The true rule is this: Where the true place of the boundary line is in dispute, and *cannot* be ascertained from the *deeds*, then a parol agreement fixing the location of the line, if *executed*, is good by way of estoppel. But where the true location can be certainly ascertained from the calls in the deed, then there can be no dispute to be thus settled, and the calls of the deed must govern. This doctrine as applied to this case upsets the whole of this part of the charge upon this subject, as against the plaintiffs. For the location of the west line of the lot was well known, was a fact undisputed. The plaintiffs were entitled to run 24.59 chs. east from this west line; nobody disputes that; no one ever has disputed that; and as the place where that would reach, could be ascertained simply by measuring that distance from an ascertained and undisputed starting point, that end of that line was legally just as certain as the other, and hence there was no dispute to be settled by parol agreement. And this rule was clearly enunciated by the Court of Appeals in the case of *Terry v. Chandler*, (16 *N. Y. Rep.* 358,) citing *Clark v. Withey*, wherein it was held that nothing short of an adverse possession for a length of time sufficient to bar an entry would be effectual to establish a line *different from that given in the deed*; with this qualification, that when the monuments mentioned in the deed can no longer be found, the acts or agreements of the parties may be resorted to as secondary evidence to supply the hiatus created by the hiatus of the monuments. So in *Clark v. Baird*, (5 *Seld.* 183,) it was also held that parol declarations and agreements, intended to establish a line

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different from that given in the deed," would, if effectual, amount to either a conveyance of lands by parol, in case the declarations and agreements intended to establish a line different from that given in the deed, or else, if they were prior to, or cotemporary with its delivery, such declarations of the intended effect of the language of the deed, if effectual, would violate the rule which forbids parol evidence to alter a written contract." The learned judge who delivered the opinion says, in conclusion, that upon principle, where the description in the deed designates a piece of land as that conveyed, the description cannot be departed from by parol evidence of intent or of acquiescence in another boundary, unless such an adverse possession be shown, as is in itself a bar to an ejectment." (See also *Reed v. Farr*, 35 N. Y. Rep. 116.) The necessity of this restriction upon the rule is well exemplified in the present action. John M. Raynor was a cripple, unable to get to the line; he said Almar Blanchard knew where the lines were, and he would point them out. Supposing he had done so correctly, and never knowing to the contrary, the fence was built upon the line pointed out by Blanchard, and although the calls in the deed showed conclusively, and beyond any dispute, that this line as thus pointed out by Blanchard, was but 17.83 chs. east of the west line of the lot instead of 24.59, as called for by the deed, yet the court was asked to, and did in effect, charge the jury that Mr. Raynor thus lost, *practically conveyed to Timerson*, 6 76-100 acres of land, and that he was estopped from alleging to the contrary, because both parties improved their lands upon each side of this preposterous and mistaken line only from 1857. I submit that such has never yet been the law of this state, and further that if it shall ever become the law, the statute, requiring a writing to convey title to real estate will become worse than a dead letter; it will become a snare to be evaded by the parol evidence of any one who will testify that a former

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owner, now dead, authorized him to show the line to an adjoining owner. 2d. The charge, as it was given, was sufficient to carry a verdict for the defendant, upon that point, as the verdict, compared with Lake's map, will show. The defendant insisted that the agreement between Blanchard, as the agent of Raynor, and Timerson, fixed the west line of the nine acres which was conveyed by Raynor to Timerson, at the fence which was built between them, and the jury so found, and have left Timerson his nine acres with that fence as his western boundary. The lands described in the verdict all lie east of the east line of that nine acres. Hence the defendant has no reason to complain of this charge; it brought just the verdict asked for by the defendant, *in that respect*. Lastly. Therefore judgment should be ordered for the plaintiff upon the verdict, with costs.

*Geo. Rathbun*, for the defendant. I. The court erred in charging the jury that "if the location made by Almar Blanchard was erroneous, and Raynor was ignorant that the mistake had been made by Blanchard, and was ignorant of the subsequent improvements by Timerson, then the plaintiffs are not estopped." This charge conveyed to the jury the idea that if Blanchard failed to locate this line where Raynor's deed called, and Raynor was ignorant of the line Blanchard located, then there could be no estoppel. In *Clark v. Wethey*, (19 *Wend.* 320,) it was held that an actual location, *different from the deed*, may be fixed upon by express agreement, and is obligatory upon the parties. And in *Jackson v. McConnell*, (12 *Wend.* 421,) the charge of the judge was that the plaintiff was not bound by the location if it was *erroneous*, unless he *knew* of the error and agreed to be bound by it. This was held to be *error*, and a new trial granted. Ignorance of law, or ignorance of the facts of the true state of the matters at the time, does not prevent the application of

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the doctrine. (See *Kingsley v. Vernon*, 4 Sandf. 361; 21 Wend. 173.) An estoppel *in pais* is created when the party asserting the estoppel has been induced by the acts of the party sought to be estopped, to believe the existence of the facts to which the estoppel relates, and that he has in good faith acted upon such belief, *Lawrence v. Brown*, 5 N. Y. Rep. 394,) whether the party to be estopped knew of it or not; for to compel the party seeking to establish the estoppel to prove knowledge of his acts done under the very agreement itself, would be a stultification of the agreement. Blanchard was employed by and as the agent of Raynor, and he is bound by those acts, precisely as though he had been present and performed the same acts. He declared to the defendant by that act, that the land east of that line fence is yours; do as you please with it; clear, ditch, drain it. This was in 1855. The defendant commenced clearing the swamp soon after he bought in 1853, and cleared all up in four years. In April, 1857, he (the defendant) bought nine acres of Raynor, starting on this fence and line. At that time, the defendant's land, east of fence, was cleared off and ditched. All this work was done by him because it was his land, as agreed with Raynor. There was no uncertainty, no dispute, no encroachment, no trespass. He was acting in good faith upon the mutual agreement as to the line, and because of that agreement. It was his land, and he treated it as his, and so did Raynor. Raynor knew of the location, and that the land east of the line fence was called and treated as the defendant's. Under these circumstances it is not material, nor was it necessary that Raynor should have notice or should know whether the defendant was making permanent or valuable improvements, to estop him. He had Raynor's admission that the land was his. That led him to make the improvements. Those improvements being much more than the land was worth at the time that line was settled, estops

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the plaintiffs. There never had been any dispute about that line then, nor was there any until about the time Raynor died, and then it came from the plaintiffs' attorney. Every act of the defendant in clearing, ditching and draining the identical land recovered in this suit by the plaintiffs, was caused and authorized by the acts and words of Raynor. In April, 1857, after this land had been cleared off by the defendant, Raynor, in his deed of the nine acres, describes that line fence as his east line.

II. The court erred in refusing to charge as requested "That if the jury find that Almar Blanchard was the agent of Raynor to locate the line, and did so locate it, and the defendant and Raynor both acted upon it, and the defendant made the improvements in consequence of such location, then the plaintiffs are estopped." This is all that is necessary to estop the plaintiffs. This was the inducement for the defendant to expend his labor and money. It was his own land he was improving. To take that land from him now, is to defraud him out of all his expenditures.

When a party mistakes the line of his land and encroaches on his neighbor's, and makes permanent and valuable improvements thereon, it works no estoppel, unless it can be shown that the owner of the land knew of the improvements thus being made, and also that the party supposed he was improving his own land. If with knowledge of these things he allows the party to proceed in his work without notice of his mistake or any remonstrance, he will be estopped. He would be guilty of a fraud, otherwise, which the law will not tolerate. This is because he failed to speak, when as an honest man he was bound to speak. After the defendant and Raynor agreed upon the line, and built a line fence between them, Raynor knew that the defendant supposed the question was at rest, and would use that land in the same manner



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as any other part of his farm. That was the object and intent of both parties. Raynor had a ditch dug on his side of the line fence; the defendant cleared off his swamp up to the line fence, and then bought nine acres of Raynor west of that fence. Raynor in his deed recognized that fence as the line, and as a monument in his deed. This estops the plaintiffs. Raynor's declarations and acts induced the defendant to rebuild the first line fence, and to clear off and ditch and drain the swamp, and also to purchase the nine acres west and adjoining it. Now either of those things should estop the plaintiffs. Instead of that, they have cut out six acres and upwards, and interlocked lands with him. His improvements are lost to him. The value of the nine acres is greatly reduced by being severed from his farm. His line fence is doubled in length and expense. All these results grow out of the acts of Raynor, and without any fault on the defendant's part.

III. The court erred in refusing to charge the jury as requested by the defendant. That request is the law in this case, "that if the line was agreed upon and fenced by Raynor, through an agent, and the defendant agreeing to it, and making permanent improvements upon the land up to the fence, and Raynor also up to the fence, then the plaintiff, after a lapse of a number of years, is estopped from interfering with that line, whether he knew of the improvements being made or not."

IV. The court erred in charging the jury "that to constitute an adverse possession, it must continue for twenty years and must be peaceable." Such is not the law. If the possession is continuous for twenty years, under claim and color of title, it is adverse and by lapse of time becomes perfect, no matter how much disturbance may have been made during the twenty years by any other claimants.

V. The jury in locating the nine acres, established the line between Raynor and Timerson, which was the same

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line pointed out by Blanchard. The deed, first of all, called for a location of the line fence. Now when that line was located by the jury for one part of the case, namely, the nine acres, it must remain the same for the whole case. If it was the line before and when Timerson purchased, it was the line when this case was tried. The verdict of the jury is so inconsistent that for this a new trial should be granted.

*By the Court, JOHNSON, J.* The only questions in this case of any importance, arise upon the charge of the judge, and his refusal to charge as requested by the defendants' counsel. The judge charged that if the boundary line between the two pieces of land, was erroneously located by the person designated by Raynor, (under whom the plaintiffs claim,) to point out the line, and Raynor was ignorant that any mistake had been made, and was also ignorant of the subsequent improvements made by the defendant, in fencing and clearing up to such line, the plaintiffs were not estopped or precluded from insisting upon the true line. To this part of the charge the defendant excepted, and requested the judge to charge that if Blanchard, the person designated by Raynor to point out the line, was the agent of the latter for that purpose, and did locate it; and each party acted upon it; and the defendant made improvements in consequence of it, the plaintiffs were estopped from claiming to the true line. The judge refused so to charge, and exception was taken to the refusal. There was evidence in the case tending to show, that Raynor was a cripple, unable to get from his house, and did not know where the line was between himself and the defendant; that when the defendant called upon Raynor in reference to building the line fence, Raynor sent him to Blanchard, to have him, Blanchard, point out the line, saying that Blanchard knew where the line was; and that Raynor never knew where the line had

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been pointed out or located, nor what the defendant had done in the way of fencing and improving the land. This location was made in 1855, and the improvements upon the land were made from year to year after that. The jury found in favor of the plaintiffs on this question of Raynor's want of knowledge. Upon these facts as established by the finding of the jury, the elements necessary to create an estoppel are entirely wanting. Raynor, supposing that Blanchard knew where the line was, sent a request to him to point it out to the defendant. It turns out that Blanchard did not know where the line in fact was, and pointed out the wrong line. The defendant was as much bound as Raynor to know where the true line was between the two lots, and it does not appear from the case that there was any difficulty in ascertaining the true line by survey and measurement. In fact I do not see why Blanchard, under the circumstances, was not as much the agent of the defendant as of Raynor. It is not the case where the line was uncertain and difficult to discover, but a case where the defendant instead of taking any steps to ascertain, chosed to take the word of Blanchard, and thus, by the mistake of Blanchard, an erroneous line is located, and the partition fence built upon it. Raynor never knew where the line was located, and never knew that the defendant was making improvements upon his land in reference to the erroneous location. The erroneous location was as much the fault of the defendant as of Raynor, and as the latter never knew where the location was made, nor that the defendant was making improvements upon the land on his side of the line fence, he was not called upon to speak, or to give notice, and his silence under the circumstances, implies no acquiescence in the defendant's proceedings, and no wrong. There is no case to be found, where an erroneous boundary line, established under such circumstances, has been held binding and conclusive upon the

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ground of estoppel *in pais*, short of twenty years possession under claim of title. Here possession under the erroneous location has been much less than twenty years. The facts as found by the jury, present the simple case of one making improvements upon the land of another, under an honest, but erroneous belief that he was the owner. This forms no ground for transferring the title of one to another; nor for estopping the owner from reclaiming his own. The later cases agree that possession and claim of title, under an erroneous location, short of twenty years, is not sufficient to establish title in such occupant, as against a valid paper title, unless such location was made, and the possession under it has been continued, under such circumstances as to estop the party having the paper title from asserting his claim against such occupant. (*Terry v. Chandler*, 16 *N. Y. Rep.* 354. *Baldwin v. Brown*, *Id.* 359. *Vosburgh v. Teator*, 32 *id.* 561. *Reed v. Farr*, 35 *id.* 113. *Clark v. Wethey*, 19 *Wend.* 320.)

In *Jackson v. McConnell*, (12 *Wend.* 421,) relied upon by the defendant's counsel, the action was brought by the vendor against his vendee. The defendant was put into possession of the premises by the vendor's brother and agent, who assisted in making the survey and location of the land, as the premises described in the deed, and who was also one of the plaintiffs' lessors. The weight of evidence was decidedly in favor of the accuracy of the location, according to the description contained in the deed. The court say that it is "very questionable whether under such circumstances a vendor can be permitted to allege error in the location, but if he can, it is certainly incumbent upon him to establish the error by the most incontrovertible evidence." A new trial was granted in that case, because the judge at the circuit had charged the jury "that the plaintiff was not bound by the location, if it was erroneous in any respect, unless he knew of the error *at the time*, and expressly agreed to be bound by it."

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In this respect it was held that the circuit judge went too far. There is no such error in this case. Here Raynor did not know, at the time, where his line was, and did not know where it was located, when such location was made, nor that the defendant was making the improvements. He never expressly agreed to be bound, and never remained silent when good faith and honest dealing with his neighbour required him to speak. Mere agreement upon an erroneous line is not enough, within any of the cases, and especially the later cases on this subject. Both the charge and the refusal to charge in this respect, were correct. The exception to that part of the charge that the possession for twenty years must be open, notorious, uninterrupted and peaceable, to give one who has no title, legal ownership, as against the true owner, is of no avail in this case. The exception is to the term "peaceable." But the use of that term, if wrong, could by no possibility have prejudiced the defendant, as his possession had never been disturbed, whatever may have been its character. It had been peaceable as far as it went, and there was no question that it was otherwise. The general tenor and scope of the charge on this point was right, and the exception to a single word in the sentence, which had no bearing upon any issue, or question in the case, cannot be allowed or entertained. A new trial must therefore be denied, and judgment ordered for the plaintiffs, upon the verdict.

[MONROE GENERAL TERM, September 7, 1868. *E. D. Smith, Johnson and J. C. Smith*, Justices.]

## STEPHENS vs. SANTEE.

Under section 68 of the Code, which provides that "a justice of the peace, on the demand of a party in whose favor he *shall have rendered a judgment*, shall give a transcript thereof, which may be filed and docketed in the office of the clerk of the county where the judgment was rendered," and directs that the time of the receipt of the transcript by the clerk shall be entered thereon, and entered in the docket, and "from that time the judgment shall be a judgment of the county court," there can be no judgment in the county court, unless a judgment has in fact been rendered in the justices' court.

If there has been no judgment rendered by the justice, the filing and docketing of the transcript in the county clerk's office is a mere nullity. The question is essentially jurisdictional. If it is not a judgment in the court in which the action was commenced and tried, it cannot, in the nature of things, be such in the county court.

Although such transcript is *prima facie* evidence, not only that the judgment has been rendered by the justice, but that he had jurisdiction to render it, and when presented to the county clerk properly certified by the justice, is sufficient to authorize him to file it, and docket the judgment; and the judgment of the county court is sufficiently established, *prima facie*, by the production in evidence of a duly certified copy of the transcript, and docket; yet it may be shown that the transcript is entirely false, or a forgery, and that no such judgment was ever in fact rendered by the justice.

Merely entering the verdict of the jury, in his docket, by the justice, and putting down the items of costs and adding them up with the verdict, and thus ascertaining the sum total, without doing any thing further, is not rendering a judgment on such verdict. Judgment must be rendered, and entered in some way as a judicial act.

The statute provides that in all cases where a verdict shall be rendered, in a justices' court, "the justice shall forthwith render judgment, and enter the same in his docket." (2 R. S. 247, § 124.) The decision must be evidenced by some official act. A decision in the mind of the justice, unless it is entered in the docket, or in the minutes of the trial, is of no avail whatever. It is not a legal rendering of judgment, and will not constitute a judgment, in law.

Where, although it appeared from the transcript furnished by the justice for the county clerk, that judgment was rendered by the justice, and entered in his docket, on the day the verdict was rendered, and in his certificate the justice stated that the transcript was "a correct transcript from his docket" of a judgment on record in his office, and of the whole of said judgment; yet, it appearing from an examination of the justice's docket, on the trial, that there was no such entry therein as was stated in the transcript, and that none such had ever been made there; the justice testifying that he made the entries which appeared upon his docket, at the time the verdict was rendered, but was unable to state that he had made any entry of judgment,

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in his minutes, or anywhere; *Held*, that upon this evidence the referee was authorized to find, as matter of fact, that the justice never made any entry of judgment in any way, and never rendered judgment upon the verdict.

A judgment, in a justice's court, is not completed, so that it can be enforced by execution, until it is entered in the docket, even where it has first been entered in the minutes in due time.

It is not competent to prove, by parol, the entry of a judgment, not upon the minutes of the justice, nor upon his docket.

D. wanting work, applied to S. to furnish employment; whereupon it was agreed between them that D. should cut timber from his own land, and make it into railroad ties for S. and deliver the ties at twelve cents apiece; that S. should furnish money as the work progressed, and the ties were to be his property from the time the trees were cut from the stump. Under this contract the timber for the ties was all cut, and hauled upon the land of a third person, and was there verbally turned out to S. as his property, before being levied on as the property of D. *Held*, that the contract was not within the statute of frauds, but belonged to that other class of contracts where the vendor agrees to furnish materials and manufacture for, and deliver to, the vendee, certain goods at a future day. That in this case the labor was manifestly to be done for S. upon his employment, and the referee, therefore, rightfully held that the timber became the property of S. as soon as it was severed from the stump.

The true criterion, in all such cases, is whether the work and labor, required in order to prepare the subject matter of the contract for delivery, is to be done for the vendor himself, or for the vendee. If for the latter, it is simply a case of hiring, and not within the statute of frauds.

**A** PPEAL by the plaintiff from a judgment of the county court of Steuben county, rendered on appeal from a judgment of a justice of the peace, and from an order denying a motion for a new trial.

The action was brought for the conversion of a quantity of railroad ties; the plaintiff claiming title to such ties by virtue of a purchase from one Isaac Allison, who had bid off the same at a sheriff's sale on an execution issued against the property of C. W. Daniels, who was claimed by the plaintiff to have been the owner of the ties at the time of such sheriff's sale, in the spring of 1862. The defendant, by his answer, denied the allegations of the complaint, and alleged that the ties were not the property of the plaintiff, but belonged to him, the defendant. The

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justice rendered a judgment in favor of the defendant for costs, \$4.50. The defendant appealed to the county court, and the action being upon the calendar of that court, for trial, the issues were referred to Harlo Hakes, Esq. to hear and determine.

On the trial before the referee, the appellant offered in evidence a transcript of a justice's judgment in an action brought by Isaac Allison against Charles W. Daniels, purporting to have been rendered on the 23d day of January, 1862, in favor of Allison, against Daniels, for a cause of action accruing on contract, for \$183.25, damages and costs, with the certificate of the county clerk that such transcript was filed in his office on the 15th of February, 1862. The counsel for the defendant objected thereto as immaterial, unless the original entry in the justice's docket were introduced; which objection was overruled by the referee, and the counsel for the respondent excepted. The said transcript, certificate and indorsement were then read in evidence. The counsel for the plaintiff then offered in evidence a certified transcript of the docket of said judgment in the county clerk's office, to which the counsel for the defendant objected the same as above; which objection was overruled by the referee, and the counsel for the defendant excepted. The counsel for the plaintiff then read the said transcript and certificate thereto in evidence. Also an execution issued thereon, by the county clerk, and indorsements and certificates thereon, showing that the execution was satisfied. *L. P. Weed*, a witness sworn on the part of the defendant, testified as follows: "I was an acting justice of the peace in the town of Canisteo, in 1861 and 1862. This is my justice's docket. I issued a transcript on the third of February, 1862. No other cause was tried before me between the parties. The entries on page 112 contain all the entries ever made by me in my docket in that suit. I never issued but one transcript between the parties." The counsel for the defendant then offered in



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evidence the proceedings and entries on page 112 of said docket. The counsel for the plaintiff objected on the ground that the same was incompetent and immaterial. The referee overruled the objection, to which decision and ruling the counsel for the plaintiff excepted. The proceedings were then read in evidence, and were in words and figures following:

*"Isaac Allison v. Charles W. Daniels.* 1861, Oct. 23, 1 P. M. Parties appeared pursuant to an order of the court, and answered to the suit. Robert Brundage, for plaintiff, J. D. Millard, for defendant. Issue joined in writing. Adjourned by consent until Nov. 7, at 1 P. M. Adjourned by consent of parties to the 15th of November, at 1 P. M. at which time parties appeared and a commission granted to examine Frederick K. Swarts, of Harrisburg, Pa. Commission made out and directed to Richard Hummell and William Kern, Harrisburg, Pa. Suit further adjourned to January 23, 1862, at 1 P. M. at which time the suit was tried by jury. The following sworn as jurors, [giving their names.]

By consent of parties the jury retired without being in charge of a constable, and brought in a verdict in favor of the plaintiff and against the defendant, for damages, \$175 00  
 Justice's cost, . . . . . 6 00  
 Const. cost, . . . . . 1 25  
 Plaintiff's cost, . . . . . 1 00

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\$183 25

February 3, 1861, transcript given, . . . 50

Received the costs in the above suit and notice of appeal, and \$2 for return for plaintiff. L. P. WEED, J. P."

And the said witness then further testified as follows: "I kept minutes of the trial and proceedings and evidence. I have not got them with me. I cannot tell all I entered in the minutes. I cannot say whether I did or did not enter the judgment in the minutes. I think I made these entries in the docket at the time the verdict was brought

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in." The counsel for the plaintiff then asked the witness the following question: "Did you make any other entry of judgment in this action except what you made on page 112 of this docket?" To which question, and the answer thereto, the counsel for the defendant objected, on the ground that the entry, if any, would be the best evidence, and as immaterial. The referee sustained the objection; to which decision the counsel for the plaintiff excepted.

The referee found and decided that Charles W. Daniels, in the years 1861 and 1862, was the owner, or in possession of, a piece of land, situate in the town of Canisteo, in the county of Steuben, upon which was growing a quantity of oak and hemlock timber, suitable for railroad ties. That Daniels entered into an agreement with the defendant, (not in writing,) to cut, manufacture and deliver to the defendant one thousand hemlock ties, for which he was to pay twelve cents apiece, and to pay the same as the work of getting them out progressed. The ties to be delivered on the side of the railroad track, in condition for loading on the cars. That Daniels cut, hewed and hauled out upon the lands of John Crosby, timber for about eight hundred ties previous to February, 1862, the trees were not cut up into ties, but some sticks were long enough to make five ties, and some of different lengths, and nine tenths were more than one tie in length; that the ties were in this condition until after the 11th day of February, 1862, when they were cut up and piled on the bank of the railroad by Daniels. That on the fifth day of February, 1862, a transcript, in due form of law, was filed in the clerk's office, of Steuben county, and judgment duly docketed in the office of the said county court, in an action wherein Isaac Allison was plaintiff, and Charles W. Daniels was defendant, for the sum of \$183.50, the judgment from which said transcript was issued was rendered by L. P. Weed, a justice of the peace, on the 23d day of January, 1862. That an execution, in due form of law, was issued

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by the clerk of Steuben county to the sheriff thereof, and was levied upon the ties mentioned in the complaint by V. B. Wetmore, who was one of the deputies of the sheriff of Steuben county. That the said ties were sold by the said sheriff, and purchased by Isaac Allison, who within a few days, and before the time of commencement of this action, sold and transferred all the interest in the said ties to the plaintiff in this action. That when said levy was made, the timber lay upon the lands of the said John Crosby; some of the timber was long enough for five ties, and most of the pieces long enough for two ties and upwards. The said referee also found and decided, that the timber was transferred to the defendant and became his as soon as it was severed from the stump. To which decision the counsel for the plaintiff excepted. The referee also found and decided that the ties were delivered to the defendant on or before the 8th day of February, 1862, and that they then became his property. To which decision and ruling the counsel for the plaintiff excepted. The referee also found and decided that the proceedings and judgment in the action before L. P. Weed, were void. To which decision the counsel for the plaintiff excepted. And also that the transcript issued by the said justice was without any foundation, there being no valid judgment to sustain it. To which decision the counsel for the plaintiff excepted. The referee also found and decided that the judgment of the county court, upon which the execution was issued to the sheriff, and upon which the ties were sold, was void. To which decision and ruling the counsel for the plaintiff excepted. The referee also found and decided that the execution issued by the county clerk, by virtue of which the ties were levied upon by Deputy Sheriff Wetmore, was void. To which decision the counsel for the plaintiff excepted. The referee also found and decided that the sale of the said ties, and the purchase by the appellant, were void, and that the plaintiff was not

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entitled to recover in the action. To each of which decisions the counsel for the plaintiff also excepted.

A motion was made in the Steuben county court, at the June term, for a new trial, upon a case and exceptions, when an order was duly made and entered by the said court denying said motion; from the decision denying said motion for a new trial, the appellant appealed to the Supreme Court.

*John W. Dininny*, for the appellant. I. The referee erred in holding and deciding that the judgment of the justice was void. The statute provides and declares what entries shall be made by the justice in his docket. (3 *R. S.* 5th ed. 456.) He is not required to follow any particular form, and if he enter the verdict and the costs, that is sufficient. The verdict and costs make up the judgment. The amount of each were entered in the justice's docket, and were added together, making the judgment. This was all that was necessary to determine completely the rights of the parties. If the justice erred in the items of costs, or in any other manner, the defendant in that action had the right of appeal to correct such error, but the respondent cannot take advantage of it in this collateral way. The justice had jurisdiction of the parties and of the subject of the action, and a judgment (though perhaps informal) was entered. This was sufficient. The statute prescribing the entries in the docket are directory only. (*Humphrey v. Persons*, 23 *Barb.* 313-318. *Hall v. Tuttle*, 6 *Hill*, 38.) Statutes directing the mode of proceedings by public officers are directory only, and are not regarded as essential to the validity of the proceedings themselves, unless it be so declared by statute. (*Holland v. Osgood*, 8 *Verm. Rep.* 280. *The People v. Cook*, 14 *Barb.* 291.) It was not necessary that the judgment should be entered in his docket. An entry in his minutes was sufficient.

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II. The referee erred in excluding the answer to the following question: "Did you make any other entry of judgment in this action except what you made on page 112 of this docket?" (*Hall v. Tuttle*, 6 *Hill*, 38. *Walrod v. Shuler*, 2 *Comst.* 134.)

III. The referee erred in allowing the respondent to prove and introduce in evidence the docket of the justice. The transcript of the judgment had been filed, and the judgment had become a judgment of the county court, and was conclusive. The Code declares that the time of the receipt of the transcript by the clerk shall be noted thereon and entered in the docket, and from that time the judgment shall be a judgment of the county court. (§ 63.) The transcript takes the place of the judgment roll. (*Jackson v. Tuttle*, 9 *Cowen*, 233—8. *Jackson v. Withereil*, *Id.* 182. *Dickinson v. Smith*, 25 *Barb.* 102. *Lyon v. Manly*, 18 *How.* 267.) An action cannot be brought upon such judgment without leave of court. (*Lyon v. Manly*, 32 *Barb.* 51.) If the justice had no jurisdiction, the defendant should have moved to set the judgment aside, or appealed from the judgment, and have reversed it. No question was made before the referee that the justice had no jurisdiction of the parties or the subject matter; the only objection was, that he had omitted to make the proper entries in the docket.

IV. The title to the ties never passed to Santee. The agreement was void, not being in writing. It was an agreement for the sale of timber, which was, at the time, annexed to the freehold. Santee did not and could not obtain any title to the ties by the talk he had with Daniels on his way to Bath. If it was an agreement to manufacture the ties out of his own timber, and deliver them finished, at a given place, the title would not pass until completely delivered. (*Andrews v. Durant*, 11 *N. Y. Rep.* 35. *Comfort v. Kiersted*, 26 *Barb.* 472.) These ties were never delivered. What was done on the 8th of February

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was of no avail. Santee insisted on railroad inspection, and having them cut up and delivered on the railroad. He did not then accept them as completed. The culls were not designated. The ties were not finished, or deposited where they were to be left. On a sale of goods, so long as any act remains to be done by the seller, the property does not vest in the buyer. (*McDonald v. Hewett*, 15 *John.* 349. 19 *Barb.* 461, and the cases there cited.) Although there has been a delivery of the property, yet where any thing remains to be done, the seller does not lose his lien, nor part with his title thereto. (*Calkins v. Whcaton*, 2 *N. Y. Legal Obs.* 425. *Joyce v. Adams*, 4 *Seld.* 291.) The proof shows conclusively that there had been no delivery, and none was understood to be by the parties.

V. Santee waived his right to hold the ties against this execution, and he is now estopped from claiming them. (*Dennison v. Ely*, 1 *Barb.* 610. *Tilton v. Nelson*, 27 *id.* 595. *Dezell v. Odell*, 3 *Hill*, 215.)

*W. B. Jones*, for the respondent. I. The ties in question were never the property of Daniels after they were severed, and the referee has so found as a question of fact. The contract under which the ties were got out by Daniels, testified to by Daniels and by Santee, the only witnesses to the agreement, required that finding by the referee. The agreement was valid, and the provision by Santee that they were to be his as soon as cut, was one the parties were entirely competent to make. The ties were the product of property which Daniels had, and, therefore, potentially his, and subject to sale on such terms as he saw fit, there being no fraudulent intent. (*Van Hoozer v. Cory*, 34 *Barb.* 10. *Otis v. Sill*, 8 *id.* 111. *Conderman v. Smith*, 41 *id.* 404.)

II. But a delivery of the ties took place before the levy, as is shown by the testimony of Santee, all of which is

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found as a fact by the referee. (*Stanton v. Small*, 3 *Sandf.* 230. 19 *N. Y. Rep.* 330.)

III. The appellant claims an agreement, by the respondent, that Allison might "go on and get his debt, and he would not stand in his way." This is denied by the respondent, and having been passed upon by the referee, his finding cannot be disturbed. Even if such conversation had been had, no right was acquired under it that was not revoked by forbidding the sale.

IV. There was no valid judgment in Allison against Daniels, rendered by Justice Weed, and hence the transcript and execution, and sale, were without any thing to support them, and could not be the basis of a title to these ties in the appellant. All the proceedings had in that action show that Justice Weed did not forthwith, and never did, render any judgment in the action, or enter any on his docket or minutes. (3 *R. S.* 5th ed. 445. *Sibley v. Howard*, 3 *Denio*, 72. 19 *Wend.* 371. 5 *Hill*, 60.) The finding of the referee upon that subject is clearly right.

*By the Court*, JOHNSON, J. The referee found, from the evidence before him, that the judgment of the county court, upon which the execution was issued and the property in question sold, to the vendee of the appellant, was void, inasmuch as no judgment had ever been rendered in the justice's court.

This presents a new question, of considerable importance, and deserves careful consideration. The Code (§ 63) provides that, "a justice of the peace, on the demand of a party in whose favor he *shall have rendered a judgment*, shall give a transcript thereof, which may be filed and docketed in the office of the clerk of the county where the judgment was rendered." The section further provides that the time of the receipt of the transcript by the clerk shall be entered thereon, and entered in the docket, "and from that time the judgment shall be a judgment of the county court."

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But it is quite certain that in such a case there can be no judgment in the county court, unless a judgment has in fact been rendered in the justices' court. If there has been no judgment rendered by the justice, the filing and docketing of the transcript in the county clerk's office is a mere nullity. The question is essentially jurisdictional. If it is not a judgment in the court in which the action was commenced and tried, it cannot, in the nature of things, be such in the county court. The appellant, on the trial before the referee, objected to the introduction of evidence to prove that no judgment had been rendered by the justice who furnished the transcript, insisting, as his counsel does here, that the judgment is a judgment of the county court, and is conclusive, and can neither be disputed nor contradicted. But unless the law has made it a judgment, it was not a judgment, and in all cases a party is at liberty to show want of jurisdiction in relation to the subject matter, or the legality of the organization of the court, in order to defeat a judgment. (*Oakley v. Aspinwall*, 3 Comst. 547. *Noyes v. Butler*, 6 Barb. 613. 2 *Wait's Law and Practice*, 15.) And by parity, in a case like this, it may be shown that the transcript is entirely false or a forgery, and that no such judgment was ever in fact rendered by the justice. That was what the respondent sought to do here. The transcript is *prima facie* evidence, not only that the judgment has been rendered by the justice, but that he had jurisdiction to render it, and when presented to the county clerk, properly certified by the justice, is sufficient to authorize him to file it, and docket the judgment. And the judgment of the county court is sufficiently established, *prima facie*, by the production in evidence of a duly certified copy of the transcript and docket by the county clerk. (*Dickinson v. Smith*, (25 Barb. 102.) The action was tried before the justice by a jury, who rendered a verdict in favor of the plaintiff, which the justice duly entered upon his docket on the same day, and as the presumption



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is, immediately after it was rendered. But it does not appear from the docket, that any thing further was done by the justice, except to put down the several items of costs and add them up with the verdict. No judgment was rendered, as appears by the docket, at all. Merely entering the verdict in the docket, and putting down the items of costs and adding them up with the verdict, and thus ascertaining the sum total, and nothing more, is not rendering a judgment on such verdict. Judgment must be rendered, and entered in some way as a judicial act. The statute, (2 R. S. 247, § 124,) provides that in all cases where a verdict shall be rendered in a justices' court "the justice shall forthwith render judgment and enter the same in his docket." The decision must be evidenced by some official act. A decision in the mind of the justice, unless it is entered in the docket, or in the minutes of the trial, is of no avail whatever. It is not a legal rendering of judgment, and will not constitute a judgment in law. (2 *Wait's Law and Prac.* 694. *Seaman v. Ward*, 1 *Hilt.* 52.)

In the transcript which the justice furnished for the county clerk, it appeared that judgment was rendered, and entered in the docket of the justice, on the day the verdict was rendered. And in his certificate he set forth that the transcript was "a correct transcript from his docket" of a judgment on record in his office, and of the whole of said judgment. On the trial, the justice was examined as a witness, and produced his docket, and it appeared that there was no such entry upon his docket as appeared in the transcript certified to by him, and that none such had ever been made there. The justice, on his examination, testified that he made the entries which appeared upon his docket at the time the verdict was rendered, but was unable to state that he had made any entry of judgment in his minutes, or anywhere. The verdict was rendered and entered in the docket the 23d of January, 1862, and the transcript given on the 3d of February thereafter. Upon this evi-

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dence, I think, the referee was authorized to find, as matter of fact, that the justice never made any entry of judgment in any way; and never rendered judgment upon the verdict. The presumption is that he did so find as matter of fact. It is incontrovertible that none was ever entered, at any time, upon the docket. If no judgment was rendered by the justice, there was, of course, no foundation on which the judgment of the county court could stand, and it was no judgment. It has been held that if the justice enter the judgment in his minutes of the trial, in due time, it is a sufficient rendering of the judgment, although it is not transferred to the docket until after the time for entering it in the docket, prescribed by statute, has elapsed. (*Walrod v. Shuler*, 2 *Comst.* 134. *Hall v. Tuttle*, 6 *Hill*, 38.) But those decisions do not affect the question here. In this case no entry has been made, and there is no case holding that a judgment can be rendered, so as to become a valid judgment in law, unless it is entered either in the minutes of the justice, or in his docket at the prescribed time for rendering judgment. I am of the opinion that the judgment is not completed, so that it can be enforced by execution, until it is entered in the docket, even where it has first been entered in the minutes in due time. (2 *Wait's Law and Prac.* 696.)

The appellant's counsel excepted to the ruling of the referee, excluding the answer to the question put to the justice, by him, as to whether he made any other entry of judgment in the action, except that which he made on page 112 of his docket. The objection to the answer was that if he made any other entry, the entry itself would be the best evidence. The question obviously did not refer to the justice's minutes, as the justice had been examined fully in regard to the entries made therein. If it referred to some other place in the docket, the docket was present, and the entry would show for itself, and furnish the best evidence; and in any case, I apprehend, it is not competent

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to prove by parol, the entry of a judgment, not upon the minutes of the justice, nor upon his docket. The decision of the referee, as the case stood before him, was, I think, correct. This is enough to dispose of the case, as the appellant clearly had no title, except what was derived from the sale under the void judgment and execution.

But even if the judgment was not void, I am of the opinion that the referee was right in holding that the property was the property of the respondent at the time the levy was made.

The contract, according to the finding of the referee, and according to the evidence in behalf of the respondent, was not within the statute of frauds, but belonged to that other class of contracts where the vendor agrees to furnish materials and manufacture for, and deliver to the vendee, at a future day. It appears from the evidence that Daniels, the judgment debtor and respondent's vendor, wanted work for the winter, and applied to the respondent to furnish employment; and it was agreed between them that Daniels should cut timber and make it into railroad ties from his own land, or land in his possession, for the respondent, and deliver the ties at twelve cents apiece; that the respondent should furnish money as the work progressed, and the ties were to be the property of the respondent as soon as the trees were cut from the stump. The timber for the ties had all been cut and hauled upon the land of a third person, and there verbally turned out to the respondent as his property, before the levy. There was some conflicting evidence, but the finding of the referee is conclusive as to the facts, upon this question. The true criterion in all such cases is, whether the work and labor required in order to prepare the subject matter of the contract for delivery, is to be done for the vendor himself, or for the vendee. If for the latter it is simply a case of hiring, and not within the statute. (*Parker v.*

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*Schenck*, 28 Barb. 38. *Donovan v. Willson*, 26 id. 138. *Bronson v. Wiman*, 10 id. 406. *S. C. 4 Seld.* 182.) Here the labor was manifestly for the respondent, upon his employment. The verbal delivery or turning out was of no consequence. But by the agreement the timber was to belong to the respondent the moment it was severed from the stump, and the vendor was to work it up into ties for the vendee, as his employer. The referee, therefore, rightly held that the timber became the property of the vendee, as soon as it was severed from the stump. The judgment should be affirmed.

[MONROE GENERAL TERM, September 7, 1868. *E. D. Smith, Johnson and J. C. Smith*, Justices.]

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### ABBOTT vs. BOOTH

A criminal warrant should contain a command, or a requirement in the nature thereof, to the person to whom the warrant is directed, to make the arrest. A mere authority, in the nature of a license or permission to make the arrest would not be a warrant, within the statute, or at common law.

The direction is an essential part of every warrant. Unless it is directed to the sheriff, or the constables of the county, or town, or some individual officer or to some individual by name, who is not an officer, it is not a proper or sufficient warrant.

At common law, a warrant might be directed to some indifferent person who was not an officer; and this may still be done; but the practice should not be resorted to if an officer can conveniently be found.

But where the warrant is directed, in the body thereof, "to the sheriff or any constable of the county," in which the magistrate resides, an authority cannot be conferred upon a person who is not an officer, to execute the same, by an indorsement on the back thereof, signed by the justice, "authorizing and empowering" such person to arrest the defendant and bring him before the justice. Such an indorsement is not a direction to the person named therein; and the warrant will afford no justification to him for an arrest made under it.

THIS action was for an assault and battery and false imprisonment. The defendant attempted to justify under a warrant, and its indorsements, issued by A. W.

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Casey, a justice of the peace, July 8, 1866, for the arrest of the plaintiff H. W. Abbott, on a charge of assault and battery. The warrant was directed, in the body of it, "To the sheriff, or any constable of said county," and was indorsed, on the back of it, as follows:

"I hereby authorize and empower John F. Booth to arrest the within named H. W. Abbott, and bring him before me.  
A. W. CASEY, J. P."

"By virtue of the within warrant I have taken, and have in my custody the within described H. W. Abbott, who is here before the court. J. F. BOOTH, deputy."

On the trial, at the circuit, before Justice E. DARWIN SMITH and a jury, the plaintiff's counsel asked that the second defense,—justification under the warrant—be excluded, on the ground that a justice of the peace has no power to deputize another person, not an officer, to make an arrest when the warrant is not to such person by name on its face. The court sustained the objection. The defendant's counsel excepted to this ruling of the court. The court charged the jury that there was no justification for the arrest and imprisonment of the plaintiff, and that he therefore had a right of action. The jury found a verdict in favor of the plaintiff, for \$50 damages; and judgment being entered thereon, the defendant appealed.

*J. Peddie*, for the appellant. I. The warrant, taken in connection with the indorsement signed by the same officer who issued it, was sufficient, under the statute, to authorize the appellant to arrest and detain the respondent. 1. The warrant itself complies on its face, as to its recitals, with section 3 of the Revised Statutes, (5th ed. vol. 3, p. 993,) and it was also under his hand, and without seal. 2. The indorsement on the back being made and signed by the same officer, in connection with what had been

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previously signed, and all done before delivery for execution, was a sufficient direction within the meaning of the same statute. 3. The statute is, "commanding the officer to whom it shall be directed," &c. The manner in which this direction shall be made to appear upon the warrant is not pointed out. It is no part of its "recitals." The object of the "recitals" is to apprise the party of the charge. He can not be interested in its "direction." And the object of the "direction" is to protect the person who is named as the "officer" to execute the process, and to apprise him of his appointment and duty, if a private person, and he accepts it; and it can make no difference to any party how this "direction" is given, provided it is about the warrant, and appears upon or with it, properly executed by the officer issuing the process. 4. The words "to whom it shall be directed" can have no other value or importance to the party arrested than to acquaint him with the individual who interferes with his liberty. The direction is no part of the warrant. And the same thing, and indeed every thing calculated to be accomplished by the direction, if contained on the face of the process, is accomplished by the direction contained in the indorsement as it appears in this case.

II. The warrant and the indorsement were sufficient at common law, as well as under the statute. 1. It was sufficient in form, (1 *Chit. Crim. Law*, *Riley's ed. marginal p. 44*.) 2. The magistrate had a discretionary power to nominate an individual who was no officer to be his officer to execute the process. (*Barb. Crim. Law*, 459. 1 *Chitty's Crim. Law*, 38, 48½.) 3. And this nomination or direction could be made by a separate writing, indorsed upon or attached to the warrant and referring to it. 4. By a careful perusal of 1 *Chitty's Crim. Law*, (38 to 51,) under the subject "form and requisites of the warrant," it will appear that the only materiality of the direction was to designate the person by name or character who was charged with its

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execution. And this was effected by the indorsement in the case at bar. 5. Our Revised Statutes only change the common law upon these subjects in this respect; *that the accusation shall be recited in the warrant.* (See R. S. § 3, *supra*; 1 Chitty's Crim. Law, 41, 42.) 6. And by section 17, of the New York State Constitution of 1846, the common law, as it existed in the state, April 19, 1775, with other matters, it is declared "shall be and continue the law of this state, subject to such alterations as the legislature shall make concerning the same."

III. In determining the legal import and effect of the warrant and its indorsement and delivery, both parts and acts must be taken and construed together, as *one paper, one instrument*, and one *official or ministerial act*; and as a whole making the process a "proper warrant" under the statute, and being properly directed.

IV. As an independent proposition, we claim, also, that the writing on the back of the assumed warrant, by its reference to the within writing, constitutes of itself, a sufficient warrant and direction to the appellant, and within the letter, and especially the spirit, of the Revised Statutes on the subject, and must protect him in its execution.

V. For all these reasons, the several exceptions, to the ruling excluding the second defense, and to the charge of the court, were well taken. And the judgment should be reversed, and a new trial ordered, with costs.

Quincy Van Voorhis, for the respondent. I. The warrant in question constituted no authority by which Booth could legally arrest Abbott. 1. A justice of the peace has no authority to deputise any person not an officer to serve a criminal warrant. In this state justices of the peace, and their courts, are creatures of the statute. They have no jurisdiction, except what the statute provides and prescribes. While in civil actions the justice is expressly

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authorized to depute any person to serve any civil process except a *venire*, (2 R. S. 4th ed. p. 458, §§ 191, 192,) there is no such authority granted in criminal cases. On the contrary the statute concerning the arrest of offenders requires the magistrate to issue a proper warrant, "*commanding the officer to whom it shall be directed,*" to make the arrest. (2 R. S. 4th ed. p. 890, § 3. 1 Mass. Rep. 488. N. Y. Const. art. 6, § 17. 2 R. S. 225-276, 703, 606, 710.) 2. But if this is not so and we are to look to the common law for the practice, the rule there is clear and explicit that no person not an officer can serve a criminal warrant, unless the warrant in the body of it is directed to such person by name. (1 Chit. Crim. Law, 37, 38. 1 Hale P. C. 531. 2 id. 110. Barb. Crim. Law, 527-531. The King v. Weir, 1 Barn. & Cress. 288. Commonwealth v. Foster, 1 Mass. R. 488. Arch. Crim. Plead. 120, 128, and notes. In case a felony has been actually committed, the offender may be arrested by any person. (Holley v. Mix, 3 Wend. 350.)

II. The indorsement upon the warrant does not purport to authorize Booth to execute the warrant. There is no allusion whatever in it to the warrant. There exists the naked circumstance only that it is written on the back of the same piece of paper upon which the warrant is written. If this indorsement is any thing, it is a warrant of itself. It commands Booth—not to execute the within warrant—but to arrest Abbott. It is an independent instrument. It is an arbitrary direction to Booth to arrest Abbott. It has no more validity than it would have if written on a separate piece of paper, and is a nullity.

*By the Court*, JOHNSON, J. The question in this case is whether the warrant issued by the justice of the peace, against the plaintiff, afforded a justification to the defendant, for the arrest and detention of the plaintiff. The defendant was not an officer, and the warrant was not



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directed to him, in the body thereof, but "to the sheriff or any constable of the county," in which the magistrate resided. The statute (2 R. S. 706, § 3,) provides for the issuing of a warrant by a magistrate when it shall appear before him in a proper manner, "that an offense has been committed." It must be under his hand, with or without seal, "reciting the accusation, and commanding" the officer to whom it shall be directed forthwith to take the person accused and bring him before such magistrate. All the forms and authorities agree that a proper warrant contains a command, or a requirement, in the nature thereof, to the person to whom the warrant is directed, to make the arrest. A mere authority in the nature of a license or permission to make the arrest would not be a warrant, within the statute, or at the common law. The direction is an essential part of every warrant. Unless it is directed to the sheriff or the constables of the county, or town, or some individual officer, or to some individual by name, who is not an officer, it is not a proper or sufficient warrant. All the authorities will, I think, be found to agree in this. (*Barb. Crim. Law*, 459. *Addis*. 376.) At common law the warrant might be directed to some indifferent person who is not an officer. (*Barb. Cr. Law*, 459. 1 *Chit. Cr. Law*, 38.) And I am of opinion this may still be done; but a magistrate should, I think, never resort to such a practice if an officer can be conveniently found to perform the service, inasmuch as a common person cannot be compelled to make service or be punished in case of refusal. In Massachusetts it was held that a warrant addressed to the proper officers and to an individual by name who was not an officer was erroneous, and conferred no authority upon the individual to make the arrest. (*Commonwealth v. Foster*, (1 *Mass. R.* 488.) Though a doubt was expressed in that case, whether it might not be lawfully done when no officer was at hand to perform the service, and that fact was expressed in the warrant.

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But here the warrant was not in any sense directed to the defendant. The magistrate, instead of directing it to the defendant by name, and commanding him to execute it, undertook to confer an authority, by an indorsement on the back of the warrant in the nature of a permission or license to make the arrest. A warrant issued in that form, merely authorizing the arrest, without requiring and commanding it, would not be a valid warrant. Here the warrant was plainly directed to the sheriff or any constable of the county, in the body of it, and the indorsement, in the form in which it was made, was not a direction to the defendant. The learned judge at the circuit therefore properly held that the warrant afforded no justification to the defendant.

Judgment affirmed.

[MONROE GENERAL TERM, September 7, 1868. *E. D. Smith, Johnson and J. C. Smith, Justices.*]

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THE AMERICAN BIBLE SOCIETY vs. HEBARD and MITCHELL,  
executors, &c.

A testator, by his will, gave and bequeathed to his executors, \$1200, to be taken from any funds belonging to his estate, directing them to invest the same in the purchase of a dwelling house and lot, such as should be selected by his wife, and gave her the use of such house and lot for life. And he directed his executors, after her death, to sell the same, and pay over the proceeds of the sale, in equal shares, to the plaintiffs and a missionary society. This, together with other provisions of the will for his wife, the testator declared to be upon the condition that she should accept the same in lieu of dower, thirds or other share of his estate. The wife survived the testator about a month, and died before the probate of the will, and without having elected to accept the provisions thereof for her benefit, in lieu of dower, &c.; and the executors did not purchase any house and lot under the trust.

*Held*, that the plaintiffs became entitled, absolutely and unconditionally, to one half of the fund of \$1200 given to the executors in trust, upon the death of the widow of the testator, payable at the expiration of one year next after the issuing of the letters testamentary.

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*Held, also*, that the plaintiffs took, as legatees, merely, the bequest, discharged from the incumbrance of the trust. That their right to one half the contemplated fund was a vested right from the beginning, or, in any event, at the death of the widow. That an action in the nature of a legal action, to recover the legacy, could have been maintained at the end of a year from the granting of letters; and that, as more than six years had elapsed since the expiration of the year, before the action was commenced, the claim was barred by the statute of limitations.

**A**CTION against the defendants, as executors, &c. to recover the amount of a legacy. Elijah Hebard, the testator, died January 25, 1858, leaving a last will and testament, by which he gave and bequeathed to his executors, the defendants, \$1200, to be taken from any funds belonging to his estate, directing them to invest the same, as soon as practicable, in the purchase of a dwelling house and premises in the village of Geneva, such as should be selected by his wife, Hannah Hebard, and gave her the *use and enjoyment of such dwelling house and premises during her natural life*, and directed his executors, after her death, to sell the same and pay over the proceeds of such sale, in equal shares, to the financial officers of the Missionary Society of the Methodist Episcopal Church, and the American Bible Society, for the spread of the gospel. This, together with other provisions of the will for his wife, the testator declared in his will to be *upon the condition that she should accept the same in lieu of dower, thirds, or other share of his estate*. Hannah Hebard survived her husband, but died on the 27th day of February, 1858, one month and two days after the decease of her husband, and before the probate of the will, and without having elected to accept the provisions thereof for her benefit, in lieu of dower, or other share of the testator's estate; and the executors did not purchase any dwelling house and premises under this trust. The will was proved, and letters testamentary were granted to the defendants on the 10th day of March, 1858. This action was commenced on the 7th day of August, 1866. As early as the 15th day

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of November, 1859, the defendants had ample funds of the estate to pay the amount claimed by the plaintiffs, over and above all other demands, and have ever since had sufficient funds for that purpose. The cause was tried before the court, without a jury. The judge found the facts above stated, and decided, as matter of law, that the plaintiffs, on the death of Hannah Hebard, became entitled, absolutely, to one half of the sum of \$1200 so bequeathed to the executors; that the right of action to recover the same accrued at the expiration of one year after the granting of letters testamentary to the defendants, but that such right of action was barred by the statute of limitations before the commencement of this action, and he directed that judgment be entered in favor of the defendants for their costs. Judgment having been so entered, the plaintiffs appealed to this court.

*S. A. Foot*, for the appellants. I. The third clause of the will, embracing the provision in question, is a bequest of personal property to the defendants, *in trust*, for the widow of the testator and the plaintiffs. By it, the defendants, *as trustees*, were vested with the title to the said \$1200 to convert into real estate, and after the death of the widow to reconvert into money, and pay over to the plaintiffs and the Missionary Society of the Methodist Episcopal Church, in equal shares. This is a valid, active and technical trust of personal property, and takes its character from the language of the will, and not from the subsequent death of the widow of the testator. (1 *Jarman on Wills*, marg. 524, 525. *Hawley v. James*, 5 *Paige*, 318. *Kane v. Gott*, 24 *Wend.* 641. *Savage v. Burnham*, 17 *N. Y. Rep.* 561. *Leggett v. Perkins*, 2 *Comst.* 298. *Brewster v. Striker*, *Id.* 19. *Brown v. Harris*, 25 *Barb.* 124. *Van Vechten v. Van Veghten*, 8 *Paige*, 128. *Judson v. Gibbons*, 5 *Wend.* 224. *The People v. Robinson*, 17 *How. Pr.* 534.) From the time of accounting and settling of

the estate, if not before, the defendants had the money in question, not in their character as executors, but as legatees and trustees. The will does not direct them to perform acts within the range of their duties as executors, but vests in them the title to the property, and directs them what to do with it. They stand in the position described by Chancellor Walworth in *Valentine v. Valentine*, (2 Barb. Ch. 438,) which would entitle them to double commissions. (See also *Drake v. Price*, 1 Seld. 430.)

II. The rule is, that no lapse of time bars a direct and express trust, as between the trustee and *cestui que trust*. (*Decouche v. Savetier*, 3 John. Ch. 190, 216. *Goodrich v. Pendleton*, 3 id. 384. *Arden v. Arden*, 1 id. 316. *Coster v. Murray*, 5 id. 522. *Murray v. Coster*, 20 John. 582,) It is shown the defendants, in their character of executors, had in hand \$16,848.13. Of this, \$1200 was given them upon the said trust, to invest for the widow and convert into money again for the plaintiffs. If this is, or was, a trust, it never has been terminated; it still subsists, and the widow having died, and thus rendered the investment of the \$1200 in land unnecessary to effectuate the testator's intention, that sum passed to the defendants, as trustees, by virtue of the bequest, and they still hold it as such trustees. It is true that, as executors, they had an accounting in 1859, but of this the plaintiffs had no notice, and, except such accounting, there has been no attempt to close this trust.

III. If, indeed, there were any limitation of time for the commencement of this action, the period of such limitation is "ten" or "twenty" years. (*Code of Procedure*, §§ 73 and 90, sub. 2, § 97.) Before the enactment of the Revised Statutes, strictly speaking, the statute of limitations did not apply to a court of equity. That court, however, adopted it, but with its own restrictions, which were, that in cases of fraud and trust it should not apply. (*Murray v. Coster*, 20 John. 582. *Decouche v. Savetier*, 3

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*John. Ch.* 190. *Arden v. Arden*, 1 *id.* 316.) At a later period, and after the legislature had given, by statute, a concurrent remedy to courts of law in certain cases, before then cognizable solely by a court of equity, the court of chancery, in the exercise of its discretion, adopted the rule laid down by the chancellor in *Kane v. Bloodgood*, that where there is a legal and an equitable remedy, in respect to the same subject matter, the latter is under the same statute bar as the former. (*See Kane v. Bloodgood*, 7 *John. Ch.* 118; *Rundle v. Allison*, 34 *N. Y. Rep.* 182.)

IV. But the claim at bar is in the first place upon a *technical, direct and active* trust; and in the second place does not fall within that class of cases for which a remedy is given at law. (2 *R. S.* 114, § 9.) 1. The fund in question was given to the defendants, not as executors, but as *trustees*, the term "executors" in the said third clause, being merely descriptive and used only to identify the persons to whom the trust was committed. It is not, therefore, in their character as executors, but in that as trustees that they are responsible to the plaintiffs; and the remedy to compel an executor to pay a legacy does not apply. (2 *R. S.* 114, § 9. *Judson v. Gibbons*, 5 *Wend.* 224. *Conklin v. Egerton's adm'rs*, 21 *id.* 430. *Dominick v. Michael*, 4 *Sandf.* 374. *The People v. Robinson*, 17 *How. Pr.* 534.) 2. Where a power is given to executors by their individual names, or as in the present will, to executors "hereinafter named," it is certain that it vests in all who are thus named, whether they prove the will or not. (*Dominick v. Michael*, 4 *Sandf.* 400. *See also Judson v. Gibbons*, and *Conklin v. Egerton's adm'rs*, above cited.) 3. Suppose that the widow of the testator had lived, and selected a house, and the defendants had renounced as executors, the administrators *cum testamento annexo* could not have exercised the power given to the defendants to purchase. It is a personal trust, and does not pass to the administrators with the will annexed. (*Judson v. Gibbons*; *Dominick v.*

*Michael ; Conklin v. Egerton's adm'rs, supra.*) Or, suppose one of the defendants to have accepted the executorship, and the other to have renounced, still the exercise of the power to purchase a dwelling house must have been executed by both in their character as trustees, and could not have been exercised by the executor alone. (*Judson v. Gibbons, supra.*) Again, the statute was not intended to apply to a testamentary provision like the one in question; but to cases of direct legacies without the intervention of a trust, and contemplates only such legacies as from their character necessarily devolve upon the executor *virtute officii* to pay. (2 R. S. 114, § 9, 1st ed.) The trust constituted by the provision of the will in question, was one not necessarily committed to the executors, and is not committed to them *ratione officii*. The language is "unto my executors hereinafter named." This indicates that the trust is to them as individuals, and has been repeatedly so held. (*Dominick v. Michael, Conklin v. Egerton's adm'rs, supra.*) Any other persons possessing the confidence of the testator might as legally and properly have been the trustees of this fund, though the defendants had still have been the executors of the will, and in such case would have been responsible to the plaintiffs, in precisely the same character that the defendants are, to wit. as trustees, and the only remedy, one in equity. That such was the character of the legacies mentioned in the statute referred to, is apparent from the language of that statute. It provides that the legatee may have an action against the executor for his legacy, "after the expiration of one year from the granting of letters testamentary." Now, suppose that in the case under consideration, the widow of the testator had lived, and had selected "a dwelling house," under the provisions in question, the defendants had purchased it, and she had been living in and enjoying it, at the expiration of "one year from the granting of letters testamentary," will it be pretended that the plaintiffs could then

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have brought an action against the executors, under the statute referred to? And if not, then it is not for the reason that the provision in question is not a legacy within the meaning of the statute? If it be said, that as the widow died before the probate of the will, the trust became a mere passive one, and the plaintiff might have brought an action to recover the \$600, it may be answered that as the legal title to the \$1200, was in the defendants, as trustees, such action must have been an equitable one, and might, therefore, be brought within ten years.

V. But whatever may have been the rule adopted by the court of chancery, in the exercise of its discretion, and following the analogy of the statute in relation to actions at law, before the Revised Statutes took effect, or afterwards under the provisions of those statutes, it is clear that since the enactment of the Code of Procedure, those rules are of no effect as to causes of action since accrued, and the only rule or law in force upon that subject is that embraced in such Code. (*See Code of Procedure*, § 73.) 1. The action which the plaintiff is or ever was entitled to maintain against the defendants, is an action for relief. (*Code*, § 129.) Even under the statute above referred to, (2 *R. S.* 114, § 9,) the language being, "he shall be liable to such action as the case may require," the defendants were liable only to an action "for relief." Unless, then, this action came within the first subdivision of section 91 of the Code, it was only necessary to bring it within ten years. (*Code*, § 97.) But it is apparent that subdivision one of section 91 was not designed to embrace actions for relief, for the subsequent subdivisions of that section are exclusively devoted to providing what actions for relief are required to be brought within six years, and exclude any construction of the first subdivision that would make it include any action for relief. (*See* § 91, *subdivisions* 2-6.) Some subsequent sections of the Code provide within what shorter period than six



years certain other actions for relief shall be brought, and finally section 97 provides that "an action for relief not hereinbefore provided for, must be commenced within ten years after the cause of action accrued." 2. But again, this action is "upon a sealed instrument." The will in question was sealed. It is true, the seal was not necessary to the validity of the will. Neither is it necessary to the validity of a promissory note, or a lease, or an award, and yet if attached to either of these instruments, the rule of limitation applying to them is thereby changed from "six" to "twenty" years. (*Hodsdon v. Harridge*, 2 *Saund.* 64. *Smith v. Lockwood*, 7 *Wend.* 241. 2 *R. S.* 295, § 18, *subds.* 1, 3, 1st *ed.*) 3. A statute of limitation is in derogation of the common law, and should be construed strictly. (*Co. Litt.* 115. *Murray v. Coster*, 20 *John.* 592.)

VI. This was a specific bequest to persons named also as executors, and is therefore distinguishable from the cases of *Drake v. Price*, (1 *Seld.* 430,) and *Valentine v. Valentine*, (2 *Barb. Ch.* 430.) The doctrine of those cases is, therefore, inapplicable here.

VII. The defendants having in violation of their trust and of their duty, kept possession of the fund in question, for several years, and (especially the defendant Mitchell) having mixed the moneys thereof with their own, the plaintiffs are entitled as a part of the relief in this action, to be allowed interest on the same, and annual rests in the calculations of that interest.

This relief is of equitable jurisdiction exclusively. It is therefore available to the plaintiff at any time within ten years from the death of the testator. And the court at general term proceeding to give such judgment as the court at special term should have given may from the printed case, find the facts which show the breach of trust above claimed, and may adjudge relief accordingly.

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*H. L. Comstock*, for the respondents. I. Assuming that the plaintiff became entitled, at any time, to the \$600 claimed, the cause of action therefor was barred by the statute of limitations before the commencement of this action, for the following reasons, viz: 1. It is declared by statute, that "where the purposes for which an express trust shall have been created, shall have *ceased*, the estate of the trustees shall also cease," and so the courts have frequently ruled. (2 *R. S.* 780, § 67. *In the matter of De Kay*, 4 *Paige*, 403. *Hawley v. James*, 5 *id.* 318, 458. *Beltings v. Shafer*, 2 *Sandf. Ch.* 293, 296. *Lorillard v. Coster*, 5 *Paige*, 226. *Nicoll v. Walworth*, 4 *Denio*, 385.) 2. The purpose for which the \$1200 was bequeathed to the defendants had *failed*, or *ceased to exist*, before the probate of the will, and before the money came into the defendants' hands. (a.) This fund was bequeathed to the executors for a certain specified purpose, viz: To enable them to purchase a dwelling house and premises *for the use of Hannah Hebard during her life*, she to select the same, and to accept the provisions of the will for her benefit in lieu of dower; and after her death, they were directed to sell the premises, convert the same into money, and pay over the proceeds of such sale, in equal shares, to the plaintiffs and the Missionary Society of the Methodist Episcopal Church. (b.) The special, active trust, from its very nature, could continue only during the life of Mrs. Hebard, or until the dwelling house and premises should have been sold, if one had been purchased pursuant to the will. (c.) Mrs. Hebard having died before the probate of the will, and before the money came into the defendants' hands, without having made the selection or election required of her, the defendants were never authorized to purchase a dwelling house and premises with this fund. (d.) As no such purchase had been, or could be made, there was no trust in the executors after the decease of Mrs. Hebard, except that which every executor has in the personal estate of his tes-

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tator. 3. If the defendants are liable at all, it must be in the character in which they have been sued, viz. as *executors of the will*, and the object of the action is to recover a *legacy*. (*Stagg v. Jackson*, 2 Barb. Ch. 86. *Same case on appeal*, 2 Comst. 206. *Drake v. Price*, 1 Seld. 430. *Leitch v. Wells*, 48 Barb. 637. *Valentine v. Valentine*, 2 Barb. Ch. 430.) 4. The plaintiff's right to the money, (if it ever had any such right,) became absolute immediately after the death of Mrs. Hebard, and the cause of action accrued at the expiration of one year after the granting of letters testamentary to the defendants, and more than six years before the commencement of this action. (2 R. S. 90, § 45. *Id.* 114, § 9. *Clark v. Ford*, 34 How. Pr. 478.) 5. The cause of action became barred at the expiration of six years from the time it accrued. (a.) Before the adoption of the Code, and even before the Revised Statutes were enacted, it was abundantly settled that where there was a legal and an equitable remedy, in respect to the same subject matter, the latter remedy is subject to the same limitation of time as the former. (*Humbert v. Trinity Church*, 7 Paige, 195. *Same case on appeal*, 24 Wend. 587. *Souzer v. De Meyer*, 2 Paige, 574. *Pratt v. Northam*, 5 Mason, 95. 2 R. S. 301, § 49.) (b.) In this state, the right to maintain an action at law to recover a legacy was given by statute at a very early period, and was incorporated in the Revised Statutes, and such actions have been frequently sustained. (*Rickets v. Livingston*, 2 John. Cas. 97. *Van Bramer v. Executors of Hoffman*, *Id.* 200. *Dewitt v. Schoonmaker*, 2 John. 242. *Dewitt v. Yates*, 10 *id.* 156. 2 R. S. 114, § 9.) (c.) It follows, as a necessary result, that the six years' limitation prescribed by the Revised Statutes applies to an action, or other legal proceeding to recover a legacy, where the right of action arose under that statute, and so the courts have held. (*Clark v. Ford*, 34 How. Pr. 476. *Smith v. Remington*, 42 Barb. 75. *McCartee v. Camel*, 1 Barb. Ch.

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456.) (d.) The Code has not enlarged the time for bringing such an action. (§ 91, *compared with* 2 R. S. 295, § 18. *Rundle v. Allison*, 34 N. Y. Rep. 180, 183.) (e.) The claim that this case comes within section 90 of the Code is absurd; and the claim that the case falls with the provision in section 97, though a little more plausible, is equally erroneous. (*Compare* 2 R. S. 301, § 52.) 6. If it were true that the defendants held the money only as trustees, and not as executors, it would make no difference in this case; for after the death of Mrs. Hebard, the purposes of the trust ceased, and the title of the trustees also ceased; and from that time they held the funds to the use of the two societies, and the same might be recovered in an action at law, and the right of action would be subject to the six years' limitation prescribed by section 91 of the Code.) (*Maury v. Mason*, 8 Porter, 211. *Murray v. Coster*, 20 John. 576. *Borst v. Corey*, 15 N. Y. Rep. 505.) 7. The rule invoked by the appellant, that no lapse of time will bar the remedy of a *cestui que trust* against his trustee, applies only to those technical and continuing trusts which are not at all cognizable at law, but fall within the peculiar and exclusive jurisdiction of a court of equity. (*Kane v. Bloodgood*, 7 John. Ch. 90, 111. *Lyon v. Macklay*, 1 Watts, 271. *Raymond v. Simonson*, 4 Blackf. 77.)

II. The plaintiff never had any right to the money sought to be recovered, for the following reasons, viz: 1. The provision for Mrs. Hebard, in the third clause of the will, was *conditional*, depending upon her selecting a dwelling house and premises in the village of Geneva, and electing to accept the provisions of the will for her benefit, in lieu of dower, thirds, or other share of the testator's estate. 2. Mrs. Hebard could not take a life estate in the premises to be purchased until they were purchased; and the purchase could not be made until she performed the conditions upon which the defendants were directed to make such purchase; and therefore the conditions were,

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in their very nature, *conditions precedent* to the vesting of any interest in Mrs. Hebard under the third clause of the will. 3. Mrs. Hebard could not take the interest of the money in lieu of the use of the real estate to be purchased, for there is no bequest to her of the use of the money as such. 4. The bequest to the plaintiff was *contingent*, depending upon the performance, by Mrs. Hebard, of the conditions upon which the defendants were directed to purchase a dwelling house and premises for her use during her life. (a.) If the testator had declared in his will, in so many words, that in case his wife should comply with the conditions upon which the executors were directed to purchase a dwelling house and premises for her use, then the same should be purchased, and after her death the executors should sell the same, and divide the proceeds of such sale equally between the plaintiff and the missionary society, it would have been very clear that the bequest of the proceeds of such sale could not take effect, except upon the contingencies provided for in the will; for the court would not speculate as to what the testator would *probably* have done if he had anticipated the event which has happened. (*Doo v. Brabant*, 3 Bro. C. C. 393. *S. C. in K. B.* 4 T. R. 706. *Williams v. Jones*, 1 Russ. Ch. 517. *Humberstone v. Stanton*, 1 Ves. & Bea. 385. *Taylor v. Wendel*, 4 Brad. Sur. 324.) (b.) The bequest to the plaintiff is just as contingent as though the language of the will had been as last supposed; for the gift is only of *one-half of the proceeds of the sale of certain real estate*, to be purchased, and afterwards sold upon certain conditions, which might, or might not be performed; and as those conditions have not been performed, there are no proceeds of sale of such real estate, and, consequently, the bequest cannot take effect. (c.) If, instead of bequeathing the proceeds of the sale of the real estate, the testator had devised the *premises* to the societies, in equal shares, it would have been certain that the devise could not take

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effect in the event which has happened ; for there would be *no such premises*, and no right on the part of the defendant to purchase any ; and it would have been equally certain that the devisees could not claim the \$1200 instead of the premises. (d.) The gift is none the less contingent because it is of the proceeds of the sale of the real estate, instead of the real estate itself ; for it was just as *uncertain* whether there would be any proceeds of sale, as it would have been in the case last supposed, whether there would be any real estate answering the description. (e.) There is no absolute and unqualified bequest to the plaintiffs, any more than there is an absolute and unqualified devise to Mrs. Hebard ; but the devise is to take effect upon the performance of certain conditions by the devisee, and in that event, the land is to be sold after the death of the devisee, and one half of the money realized from such sale is to be paid to the plaintiffs. There is no alternative provision, giving the plaintiffs one half of the \$1200 in case the land should not be purchased, nor can such a provision be supplied by construction. There is no certain or unconditional trust created in favor of either the plaintiffs or Mrs. Hebard. The testator has pointed out the mode in which, and the conditions upon which, his bounty should take effect ; and it is not within the sphere of construction to alter the mode, or to change the conditions prescribed in the will. (f.) The testator has not provided for the event which has happened, in any other manner than by the residuary clause of his will ; and there is no satisfactory reason to suppose that he intended to do so, or even that he would have done so if he had anticipated that event. Any opinion which may be formed upon that subject, must be purely conjectural. To supply this deficiency would not be construing what is written in the will, but it would be adding a new and distinct provision. (g.) In regard to estates over, where the first estate depends upon a *condition precedent*, which for any reason fails

to be performed, so that the first estate never vests, it seems to be the rule in England that the estate over will fail also, as being dependent upon that of the first donee. (*Boyce v. Boyce*, 16 Sim. 476. *Philpot v. St. George's Hospital*, 21 Beav. 131. *Roundel v. Currier*, 2 Bro. C. C. 67.) Whether this be true as a general rule or not, it would seem that it must be so in a case like this, where the testator did not own the estate intended to be given to the first donee for life, upon certain conditions, but provided for its purchase upon such conditions, and the bequest over is of the proceeds of the sale of such uncertain estate. 5. In order to uphold the plaintiff's case, it is necessary for the court to hold, as the plaintiff's counsel contends, that the provision in the third clause of the will is an absolute and unconditional bequest of the \$1200 to the defendants *in trust*, for the use of Mrs. Hebard during her life, and for the two societies after her death, whether any dwelling house and premises should be purchased with this fund or not, and whether the conditions upon which such purchase was directed to be made should be complied with or not. If this be so, then Mrs. Hebard might have refused to select any dwelling house and premises in Geneva, and still claim the interest or income of the \$1200 as long as she lived; and thus the testator's obvious intention to provide for her a home for life, in a specified village, might be defeated. There is no language in the will upon which such a construction can be based, and it is inconsistent with what is there written. But perhaps it will be said, admitting that the trust in favor of Mrs. Hebard was conditional, and that it failed for want of compliance with the conditions, the bequest to the two societies is absolute; and that upon the death of Mrs. Hebard they are entitled to the money, if it has not been invested as provided in the will, though the conditions upon which it was directed to be so invested have not been performed. But the difficulty in the way of this

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construction is, that the *testator* has not expressed *any intention* to give to the two societies the \$1200, or any interest therein, unless the money should be invested in a dwelling house and premises in Geneva, upon the performance of the conditions upon which it was directed to be so invested. Suppose Mrs. Hebard had elected to accept the provisions made for her in the will, in lieu of dower, and had selected a house and lot in Geneva, which could be purchased for \$1000, and the executors had purchased the same for that sum; what would have become of the other \$200? Could Mrs. Hebard justly have claimed the income of this sum during her life? Clearly not. Could the two societies lawfully have claimed the principal after the widow's death? The gift to the two societies is in the form of a direction to the executors. The direction is to sell the dwelling house and premises, convert the same into money, and the *said money* pay over to the two societies, in equal shares. There is no direction to pay over to these societies any other money, or any money not arising from such a sale.

*By the Court*, JOHNSON, J. The learned judge was right, I think, in holding at special term, as matter of law, that the plaintiffs became entitled absolutely to one half the fund of \$1200, given to the executors in trust, upon the death of the widow of the testator. The defendants controvert this conclusion of law, and contend that by the failure of the widow to elect to accept the provisions made for her, in the will, in lieu of dower, in her lifetime, she having died before accepting, and before the period when she would be deemed in law to have accepted, the whole provision failed, and the trust, and trust fund with it, and no such fund ever vested in the executors. This is insisted upon for the purpose of sustaining the judgment in case it should be determined that the plaintiffs' claim is not barred by the statute of limitations. It is in this view



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only that the examination of this question is proper upon the plaintiffs' appeal. In that view, and for that purpose, it is proper, because if the judgment is such an one as the court, upon all the facts, ought to have rendered, it will be sustained, though placed upon untenable ground at the special term. But the defendants' position, though sustained by an elaborate and very ingenious and plausible argument, is not maintainable. The fund was created by the testator, and given to his executors for a two fold purpose, and upon a double trust, viz: To be invested in a particular manner, and to be used and enjoyed in that form, by his widow, during her life, and at her death to be reconverted into money, and one half thereof paid over to the plaintiffs. This fund, if it ever vested in the executors as trustees, certainly vested in them for all the purposes of the trust.

It is true, as the defendants contend, that so far as the widow is concerned, this provision, with all the other provisions of the will in her favor, was provisional, and conditioned upon her acceptance of them in lieu of her dower right. It is also true, as found by the judge, as matter of fact, that the widow died within about a month after the decease of the testator, without making her election to accept the provisions of the will in her favor, and without the selection of a dwelling house, in the purchase of which the fund was to be invested by the terms of the will. But it does not follow that this state of facts operated to divest the plaintiffs of all right and title to this fund, and cast the fund back into the mass of the funds of the estate. The plaintiffs and the other society, were the ultimate beneficiaries, or legatees of this fund, and were entitled to it absolutely, each to one half thereof, in its own right, the moment the right to the intermediate, or temporary use and enjoyment became extinguished, and the executors, if the title ever vested in them, took and held it for their benefit, as well as for the benefit of the

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widow until her right to the use no longer existed, when it became absolutely the property of these two societies. This is plainly the scheme of the will, and the evident intent of the testator. Evidently it was not intended that the plaintiffs' rights should depend entirely for their existence, upon the election of the widow to accept or reject the provisions of the will in her favor. She is not, anywhere in the will, clothed with the power of making the provision in the plaintiffs' favor valid or void at her pleasure. She might neglect or refuse to take the benefit of the provision for herself, but she could not in that way destroy the rights of the plaintiffs. The moment the right to the intervening use was extinguished, no matter how, the rights of the plaintiffs, which were in their nature ultimate and absolute, to the fund, became complete and perfect. What these plaintiffs and the other society were entitled to by virtue of the bequest, was the amount of this fund, whatever that amount might be, when the prior right, to use and enjoy, should no longer exist. It was by no means essential to the existence, or validity of the plaintiffs' right, that the fund should first be invested in the purchase of a house. That pertained to the interest of the widow only. Whatever form the fund might exist in, before the plaintiffs were entitled to possession, it was to come to the plaintiffs in the form of money only. Had it been converted in'o real estate, it might have been more or less than \$1200, when reconverted into money for the use of the plaintiffs and the other society, and then each would have taken one half, whether the amount was more or less. But as all prior right of use was extinguished before the fund had been converted into real estate, and while it existed in the hands of the executors, as it first came to them, the plaintiffs were entitled to one half, or six hundred dollars absolutely and unconditionally, payable at the expiration of one year next after the issuing of the letters testamentary. In that the plaintiffs took, as legatees

merely, the bequest discharged from the incumbrance of the trust.

The question then arises whether the plaintiffs' claim is not barred by the statute. It is obvious that the widow of the testator, having died without making her election to accept the provisions of the will in her favor, and before she could be deemed in law to have accepted the same, never became a beneficiary in fact or in law, of the trust fund intended for her benefit. The relation of trustees, and *cestui que trust* between her and the executors, the foundation of which was laid in the will, was never formed and matured, and no claims on the one side, or duties and obligations on the other, belonging to that relation, ever sprung up or existed between the parties. In that the contemplated trust, so far as she was concerned, never went into effect, and the laudable designs and intentions of the testator towards her, were frustrated, and rendered altogether unavailing by her demise before electing to become a beneficiary of the proffered trust fund. This removed all obstacles to the immediate possession and enjoyment of one half the fund by the plaintiffs. The executors, then, held it for the plaintiffs solely, and had no duty to perform in regard to it, except to pay it over. In fact the widow died before the will was admitted to probate, and all the provisions of the will, by which an active and technical trust was intended to be created, had been rendered abortive, before the funds actually came to the hands of the defendants. The trust intended never having gone into operation, or had a legal existence, there never was any technical trust in favor of the plaintiffs, and no relation of trustee and *cestui que trust* of that character between the plaintiffs and the defendants. The relation was simply that of executor and legatee, and the trust was of that character only. The right of the plaintiffs to the half of the contemplated fund, was a vested right from the beginning, or in any event at the death of the widow,

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and an action could unquestionably have been maintained therefor immediately upon the expiration of the year after the granting of letters testamentary. (2 R. S. 214, § 9.) If an action could have been maintained in the nature of a legal action to recover the legacy bequeathed, the right of action is barred by statute, as more than six years had elapsed since the expiration of the year, before this action was commenced. This is well settled. (*Smith v. Remington*, (42 Barb. 75, and cases there cited.) Where there is a strict technical and continuing trust, which is cognizable only in a court of equity, no lapse of time will bar the claim of the *cestui que trust*. But this rule is confined strictly to cases of that character. (*Borst v. Corey*, 15 N. Y. Rep. 505.) That this is no such case seems to me extremely clear. There can, I think, be no reasonable doubt that this claim was cognizable in a legal action. Indeed such is clearly the character of the action brought. It is to recover a specific sum of money, bequeathed, and not to enforce a trust as such. The court at special term was right, therefore, in holding that the right of action was barred by the statute of limitations, and the judgment must be affirmed.

[MONROE GENERAL TERM, September 7, 1868. *E. D. Smith, Johnson* and *J. C. Smith*, Justices.]

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BEACH, survivor, &c. vs. ENDRESS and PROCTOR.

The law implies the release and discharge of a right of action, when the creditor voluntarily delivers to his debtor the bond, note or other evidence of his claim.

After the money due upon a bond or undertaking has been paid by the obligors, and receipted in full on the back of the bond by one of the obligees, and the bond delivered up to the obligors for the purpose of being canceled, no action is maintainable thereon, in the absence of any allegation of fraud or mistake.

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Even if the payment made does not fulfill, completely, the measure of the obligation, it is perfectly competent for the obligees to waive the right to further performance, and surrender it to be canceled. And it having thus, by the voluntary act of the obligees, become defunct as a subsisting obligation, no subsequent occurrences can revive it in their favor, without the assent of the obligors. Hence, an action cannot be maintained thereon, even assuming that the obligees might have retained the undertaking, for further indemnity or security, had they so elected.

Where a bond is delivered up, by one of two joint obligees, to be canceled, the assent of his co-obligor will be presumed, if he makes no objection and takes no steps in a contrary direction till after the lapse of several years. Besides, the act of his joint obligee is binding upon him, and his assent need not be shown.

ON the 24th July, 1861, Richard H. Appleby sued William Marratt in the Supreme Court, and procured an order of arrest, and the plaintiff William H. Robinson became bail on arrest. Judgment went against Marratt on the 16th January, 1862, for \$351.59. Appleby thereupon sued Beach and Robinson, who then proceeded to surrender Marratt; whereupon the bond or agreement on which this action is founded, was given. Judgment was obtained by Appleby against Beach and Robinson, 7th August, 1862, for the amount of the judgment against Marratt, and an execution was issued to the sheriff of Monroe on the same day. On the 27th day of December, 1862, the defendant Endress paid the sum of \$417.39 to Robinson, who gave his receipt for it upon the bond or agreement of the defendants, and delivered it up to Endress. In the meantime Marratt appealed from the judgment against him, on the 17th March, 1862, but on the 3d of July, 1863, the judgment was affirmed, and costs of appeal given, \$141.35. On the 21st October, 1863, an execution to enforce this judgment issued against the property of Marratt, and was returned unsatisfied. On the 23d of November, 1863, an execution against his body was issued, which was returned *non est*. On the 16th of January, 1864, Appleby sued Beach and Robinson to recover the last named amount. September 12, 1865, judgment was recovered

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against them and subsequently paid, and this action is brought to recover it of the defendants herein.

On the trial, at the circuit, the plaintiff offered in evidence a bond or undertaking, executed by the defendants, dated July 19, 1862. The defendants objected to the evidence, on the ground that the bond had been surrendered to the defendants, and was a paid bond. The court overruled the objection, and the bond was read in evidence by the plaintiff.

The bond is as follows, viz :

“ Whereas, Jervis T. Beach and William H. Robinson have become security for the appearance of William Marratt, in an action brought by Richard B. Appleby against him, and, as such security, have been sued by said Appleby, and said suit is now pending ; and whereas, the said action of Appleby against Marratt has been appealed, and is to be argued before the general term of the Supreme Court. Now, therefore, the undersigned hereby agree that the said Marratt will surrender himself in the said action against said security, so as to prevent the recovery of judgment against them ; but the said security are to do nothing to hinder the undersigned Proctor from delaying a recovery in said action against the security, by stay of proceedings, or in any other manner in which the court may allow the same to be delayed, until a decision by the general term upon the appeal aforesaid. And whereas, said Robinson and Beach are now in condition to arrest said Marratt, and deliver him to the sheriff of Monroe county, and, by reason of this bond being given, said Robinson and Beach do not arrest said Marratt and surrender him to said sheriff. And it is hereby understood, that the undersigned will save harmless said Robinson and Beach from judgment being rendered against them hereafter, upon the bond given to said sheriff to discharge said Marratt from arrest, and from any costs which may hereafter be necessarily incurred, by reason of having

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signed said bond. This bond or undertaking is made in consideration of one dollar to the undersigned, paid to said Marratt, the pay of which is hereby acknowledged.

ISAAC L. ENDRESS, [L. S.]

L. B. PROCTOR. [L. S.]

Dansville, July 19, 1862."

When the plaintiff rested, the defendants offered in evidence a receipt, indorsed upon said bond or undertaking. The receipt was read in evidence, and is in the words and figures following:

"Received of Isaac L. Endress, \$417.39, being the amount in full of judgment against myself and Jervis T. Beach, as bail of William Marratt, and including two sums, of seven dollars each, costs ordered to be paid on motions, and in full of the obligations of said Endress, on the within bond or agreement. Dec. 27, 1862.

W. H. ROBINSON."

The plaintiff Robinson died pending the suit, and before the trial, and the action was continued, by order of the court, in the name of the plaintiff Beach, as survivor.

On the trial, the facts, as above stated, were proved, and, after all the evidence on both sides had been given, the defendants' counsel moved for a nonsuit, upon various grounds, and, after argument, the court dismissed the complaint, upon the whole evidence; and, in stating the grounds of the decision, held, that the contract sued upon being executory, and there being no breach at the time it was given to the defendants, the plaintiffs could not recover upon a breach happening after that. That if there had been an existing liability upon the bond at the time it was delivered up, the plaintiff might show that it was given by mistake, and recover.

To this decision ordering a nonsuit, the plaintiffs excepted. A stay of proceedings was granted for sixty days,

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to enable the plaintiff to make a case and exceptions, to be heard at the general term in the first instance. And if a case should be made, judgment was to be suspended until after the hearing and decision at general term.

*J. Van Voorhis*, for the plaintiff. I. This is a mistrial, and a new trial should be ordered. A case or a case containing exceptions cannot be ordered to be heard at the general term in the first instance. The general term will not review the evidence. No judgment can be ordered here. Neither can an exception to a dismissal of the complaint, or a nonsuit, be ordered to the general term in the first instance. (*Code*, § 265. *Hoagland v. Miller*, 16 *Abb.* 103. *Lake v. Artisans' Bank*, 17 *id.* 232. *Morris v. Brower*, 4 *Sandf.* 701. *Cronk v. Canfield*, 31 *Barb.* 171. 38 *id.* 117. 20 *How.* 257.)

II. The indemnity bond, if given up by fraud or mistake, is as much the property of the plaintiff, while in the defendants' hands as before. As between the parties to the instrument, it is of no consequence in whose hands the instrument is. We must assume that this bond was given up by mistake. The evidence is clear on that subject, and if not so, should have been submitted to the jury. The fact that one party or the other has possession of the paper, which contains the evidence of the contract, when a breach happens, cannot affect the rights of the parties. The fact that one party produces the paper may throw the burden of proof upon the other, but cannot affect the question of liability. The plaintiff was not required in his complaint to explain the defendants' possession of the bond, and he may recover, although the instrument sued on, is in possession of the defendant. (*Supervisors of Livingston County v. White*, 30 *Barb.* 72. *Selden v. Prindle*, 17 *id.* 468. 1 *Hilt.* 530. *Smith v. McClure*, 5 *East*, 476. *Garlock v. Geortner*, 7 *Wend.* 198.) The question is, whether he is the real party in interest. The evidence shows that Robinson gave



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up the bond upon the statement to him that there was an end to the bail's liability upon the undertaking, and that the matter was all got over with. This was not true; and whether Endress knew his statement to be untrue, or whether he was honestly mistaken, makes no difference. Robinson never intended to give up or cancel the bond, while there was any farther liability. If it be claimed that the evidence of Endress conflicts with that of Garlock, then the case should have gone to the jury.

III. A less sum accepted in satisfaction of a bond cannot be pleaded as a defense. A parol discharge of a bond by an agreement to receive a less sum than the amount specified in the bond is a *nudum pactum*. (*Dewey v. Derby*, 20 John. 462. *Dederick v. Leman*, 9 id. 333. *Mechanics' Bank v. Hazard*, 13 id. 353. *Watkinson v. Inglesby*, 5 id. 391. *Johnson v. Brannan*, Id. 271. *Boyd v. Hitchcock*, 20 id. 76. 3 Wend. 66. 1 id. 164.)

*Geo. F. Danforth*, for the defendant. I The plaintiff was properly nonsuited. The agreement upon which he sued had been canceled and given up, before the commencement of the action. No mistake or fraud was pretended. The agreement had performed its office. It is obvious from the agreement, that the judgment referred to and against which security was desired, was the judgment which might follow in the action pending when it was given. The action did ripen into a judgment, on the 7th August, 1862, and on the 27th of December, 1862, the defendants paid it and other moneys. There was, at the time the agreement was given up, no other breach, but by the omission to surrender Marratt, the condition of the bond was broken.

II. The writing signed by the plaintiff Robinson, on receiving the money, is a full and valid discharge, (1.) Of the amount of the judgment. (2.) Of certain motion costs. (3.) "And in full of the obligations of the said Endress on the within bond or agreement." It was competent for

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the parties to agree that this obligation should be given up, with or without consideration; the plaintiffs could say that whatever further risk there was on account of Marratt, they would assume. The plaintiff, in so many written words, acknowledged the receipt of the money paid, as "in full of the obligations of said Endress on the bond or agreement," and also surrendered or gave up the bond. This discharged the defendants from any further responsibility upon the agreement. In 2 *Equity Cases*, (Abr. 617,) Lord Hardwick is reported as saying: "If an obligee delivers up a bond with intent to discharge the debt, the debt will certainly be thereby discharged." (*Wentz v. Dehazen*, 1 S. & R. 317. *Picot v. Sanderson*, 1 Dev. 309. *Lacey v. Lacey*, 7 Barr, 251. *Albert v. Ziegler*, 29 Penn. Rep. 50.) No consideration was necessary to support such a transaction, for it was executed. But, if otherwise, it exists.

1. If the undertaking on the part of Beach and Robinson, "not to arrest" said Marratt and surrender him, has any application to proceedings other than those contemplated when the agreement was given, then by canceling or giving up the bond or agreement, Beach and Robinson acquired the right to arrest Marratt, if it had in the mean time been suspended, and that right might have been exercised at the very time of giving up the agreement, for Marratt and Robinson were both present.
2. The sum of \$417.39 was paid and received, not more for the judgment and motion costs, than it was "in full of the obligations of Endress," upon the bond. The consideration applies to each and all. The rule of the common law, that a sealed instrument can only be released by an instrument of equal dignity with the original, has no application to the case of an executed agreement; nor to one where the original instrument itself is delivered to the person bound; nor to one where the condition was broken. (7 *Cowen*, 224. 27 *Barb.* 485.) If a debt or duty is created by giving to the obligee an instrument, sealed or unsealed, it may be

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discharged by an act of "contrary significance," as its delivery up by the obligee to the obligor. (*Shepherd's Touchstone*, 327.) Nor is such rule now enforced. Performance of a covenant may be waived by parol, and so may it be discharged. (*Friess v. Rider*, 24 *N. Y. Rep.* 369. *Stone v. Sprague*, 20 *Barb.* 515. *Dearborn v. Crass*, 7 *Cowen*, 48-51.)

III. The transaction was perfect as an accord and satisfaction with Endress, and so discharged both obligees. (*Parsons on Contracts*, p. 23, and cases cited, note i. *Milliken v. Brown*, 1 *Rawle*, 391.)

IV. For the above reasons, a new trial should be denied, and judgment ordered on the verdict.

*By the Court*, JOHNSON, J. I am clearly of the opinion that the nonsuit was properly granted. The action is sought to be maintained upon an undertaking which had been receipted in full and delivered up to the obligors, by the obligees, more than three years before such action was commenced. No fraud, or mistake of fact, by way of inducement to the obligees, to deliver up the obligation, is alleged or proved. At the time of the redelivery the defendant Endress paid the amount of a certain judgment which had been recovered against the obligees, together with certain motion costs, and the same was receipted on the back of the undertaking, and the receipt in terms specifies that the same is "in full of the obligations of said Endress in the within bond or agreement." The money was received by Robinson, one of the obligors, or by the sheriff who held the execution issued upon the judgment against them, and in the presence of their attorney in the action, or with his knowledge and assent, and the receipt was signed by Robinson only. Apparently it was surrendered and delivered up for the purpose of having it canceled, and as a satisfied and extinguished demand, and nothing whatever is shown to the

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contrary. Upon such a state of facts no action is maintainable upon the obligation. Having been delivered back by the obligees to the obligors for the express purpose of relinquishing any and all further claims, it had no longer any vitality or binding force between the parties. It is laid down in *Shepherd's Touchstone*, p. 70, "and if a deed (viz. a bond) be delivered up to the party that is bound by it, to be canceled, and it be so; or if he that hath the deed doth by agreement between him and the other cancel the deed; by either of these means the deed (provided no estate passed) is become void." It is further added: "But if an obligee deliver up an obligation to be canceled and the obligors do not afterwards cancel it; but the obligee happen to get it again, into his hands, and sue the obligors upon it, the obligor hath not any plea to avoid it, for the deed remains still in force in law, (but the obligee [obligor?] would be relieved in equity.")

The law implies the release and discharge of a right of action, where the creditor voluntarily delivers to his debtor the bond, note or other evidence of his claim. (*Poth. Obl. n. 608, 609. Bouv. Law Dic. title Release.*) It has been expressly held by the Supreme Court of Pennsylvania, that the cancellation of a bond, or delivery to the obligor with that intent, discharges the debt. (*Lacey v. Lacey*, 3 Barr, 251. *Albert v. Zeigler*, 29 Penn. Rep. 50.)

Even if the payment made did not fulfill completely the measure of the obligation, it was perfectly competent for the obligees to waive the right to further performance, and surrender it to be canceled. Having thus by the voluntary act of the obligees, become defunct as a subsisting obligation, no subsequent occurrences could revive it in their favor, without the assent of the obligors. This action cannot therefore be maintained, even assuming that the obligees might have retained the undertaking for further indemnity, or security, had they so elected, after the payment of the judgment against them by the obligors.

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But I am of the opinion that the undertaking only related to the action then pending against the obligees in favor of Appleby. They were in default in their undertaking on account of Marratt having failed to render himself amenable to the process of the court, and had been prosecuted therefor. They might have relieved themselves by paying the judgment against Marratt, or by surrendering him. But they had done neither, and the action had been brought, and it was manifestly against their liability, involved in the then pending action, that the defendants intended and undertook to indemnify and save them harmless. This is apparent, I think, from the whole tenor of the undertaking. No other or further liability was contemplated or apprehended, and consequently there was no reason why any other should be provided for. The language of the undertaking is to be interpreted in the light of the state of things then existing. That the parties on both sides so understood it, is clear beyond all peradventure. The action against the obligees resulted in a judgment, and execution was issued against them and placed in the hands of the sheriff, and when one of the defendants went and paid up the execution and all the costs to which the obligees had been subjected in the course of that litigation, the undertaking was receipted in full, and given up to be canceled as an obligation satisfied and fulfilled entirely. No one connected with the matter at that time, seems to have entertained any doubt upon the subject, and no other or further claim was made or hinted at. This ought to be conclusive on this question. It is now said that the plaintiff Beach was not present so as to assent to it. But his assent must be presumed, as he made no objection and took no steps in a contrary direction till after the lapse of several years. And besides, the act of his joint co-obligee was binding upon him, and his assent need not be shown. (*Wallace v. Kelsall*, 7 Mees. & Wels. 264.) I conclude, therefore, that the defendants

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were entitled to have the fund delivered up as it was, the moment the payment was made, as a paid or fulfilled and satisfied instrument, and that the obligees had no right to retain it for any purpose.

When Marratt failed to render himself amenable to the process to enforce the second judgment, three years and over, after the undertaking in question had been given up, the remedy of this plaintiff and Robinson, was, to surrender Marratt instead of undertaking to revive the extinct undertaking of the defendants. Their right to surrender was then complete. For although it may have been suspended during the life of the defendants undertaking, for causes existing at that time, or up to the time of giving it, it was fully restored, if indeed it had ever been suspended, as to all subsequent defaults on the part of Marratt.

A new trial should therefore be denied.

[MONROE GENERAL TERM, September 7, 1868. *E. D. Smith, Johnson and J. C. Smith, Justices.*]

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VOORHEES vs. DORR.

Illegal maintenance was repealed or abrogated by the Revised Statutes, and does not now exist in this state, except in the single case mentioned in those statutes.

C. claimed to have a demand against M. which, being about to leave the state, he wished to have prosecuted. It was thereupon agreed between the plaintiff and defendant and C. that the latter should assign his claim to the plaintiff, and that the defendant should prosecute the demand as attorney, in the plaintiff's name, but the plaintiff was to have no interest in the moneys recovered. The defendant agreed to pay the plaintiff \$50, whenever the action was determined, together with his necessary expenses in attending court. His compensation for the time spent in attending court was to be included in the \$50, and he was to be saved harmless from all costs and expenses of the litigation. *Held*, that although this agreement, so far as the plaintiff was concerned, came exactly within the general definition of maintenance, yet that it did not fall within the condemnation of the statute, and being in no respect contrary to any existing law, it could be enforced.

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*Held, also*, that the plaintiff, when he entered into this agreement with the defendant, was not guilty of doing an illegal act; and it was not barratry on his part, because it was but a single instance, and that offense consists in the *practice* or *habit* of stirring up strife.

*Held, further*, that the case did not fall within the provisions of the Revised Statutes forbidding attorneys, &c. buying rights in action to prosecute, or lending or advancing money, &c. to procure suits, and making all such acts misdemeanors, and subjecting such attorneys, &c. to removal from office; nor within the scope of the maxim *ex turpi causa non oritur actio*.

Where a witness states that a letter is lost and he cannot tell what has become of it, that is sufficient evidence, *prima facie*, of loss, to admit parol evidence of its contents; where the witness is not cross-examined for the purpose of ascertaining where he kept his letters, or whether he preserved them at all, or what search he has made; but the objection is that there is no evidence that it has been destroyed, or that the witness has searched for it where he usually keeps his letters.

Where it does not appear that at the trial the defendant insisted upon a juror sitting, or took any exception to his exclusion, it is too late to raise an objection, or take exception, upon appeal.

THIS action was commenced before a justice of the peace, who gave the plaintiff judgment for \$80, besides costs. Upon appeal it was affirmed by the county court of Livingston, and the defendant appealed to this court. The cause of action stated in the complaint, is for work and labor, and money paid, laid out and expended; but, stated in evidence by the plaintiff was mainly upon a contract, by which the defendant was to pay the plaintiff \$50 for permitting a suit in which he had no interest to be brought in his name. The agreement is more fully set forth in the opinion of the court.

*Geo. F. Danforth*, for the appellant. I. The contract for the payment of the above named \$50 was void. (*Sedgwick v. Stanton*, 14 N. Y. Rep. 289.) This case was cited by the learned county judge, to sustain the judgment he was about to render. But it wholly fails to do so. The facts involved were wholly unlike those here presented, and the law announced has no application. And so it expressly appears, for at page 300, the court say: "The

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act of one who assists in embroiling his neighbor, is a distinct offense from that of champerty, and still punishable." The case before the court is the precise case suggested by the court in the case of *Small v. Mott*, (22 Wend. 406,) where the chancellor, speaking for an unanimous court, says: "I do not think, however, that agreements actually champertous, as where a stranger to the subject of the litigation, who has no interest therein in law or equity, or in expectancy, by the ties of blood or affinity, agrees to assist in embroiling his neighbor in litigation, or in carrying their suits through the different courts after they are commenced, upon a stipulation that he shall receive a share of the fruits of the litigation as a reward for his mischievous interference, can be enforced in courts of justice;" and this doctrine is affirmed and reiterated upon reference to those remarks in the case also cited from the 14th New York Reports, (p. 300.) In the case before this court, Voorhees, the plaintiff, had no interest whatever in the suit about to be commenced in his name. In *Benedict v. Stuart*, (23 Barb. 420,) this court takes a distinction between an agreement to share in the proceeds of a litigation and an agreement to bear the expenses; holding the former valid and the latter invalid. The latter quality exists in the case at bar. (See *Brotherston v. Consalus*, 26 How. Pr. 213.) In *re. Martens*, (4 Dowl. 18,) cited by *Parsons*, (2 Pars. on Cont. 263, n. 1,) it was considered maintainance for an attorney to agree to save a party harmless from costs provided he were allowed one half of the proceeds of the suit in case of success. *Harrington v. Long*, (4 Mylne & Keen, 590; Eng. Com. Law Rep. 140;) is a very full and instructive case in support of the appellant's position. (*Anderson v. Radcliff*, 1 Ellis, B. & E. 806.)

II. The agreement is void as contravening the provisions of 2 Revised Statutes, chapter 3, article 3, title 2, page 288, section 52. This statute prohibits any attorney from



lending or advancing, or agreeing to lend or advance, any money or any thing in action as an inducement to the placing in the hands of such attorney any debt, demand, or other thing in action for collection. A subsequent section of the same statute makes such act a misdemeanor. The contract in question provides for the payment of fifty dollars for a purpose prohibited by this statute, and cannot stand. *Ex turpi causa non oritur actio*. No principle is better settled in the law, and it is unnecessary to cite authorities in its support.

III. Parol evidence of the contents of a letter was improperly admitted.

IV. The court erred in rejecting Williams as a juror.

V. If the court look into the evidence they will find that it fails to support the verdict. The jury in justices' courts are the judges of the law and facts. (6 *Hill*, 326.) A void contract is evidence of the measure of compensation, terms, &c. unless the action is brought to enforce performance. In an action for work and labor it could not be legally objected to. (2 *Cowen*, 660.)

*Vanderlip & Smith*, for the respondent. I. It was not error to overrule the amended answer of the defendant. 1. It was matter of discretion. 2. The amended answer proposed was insufficient. It does not show that the former suit was first commenced, or the issue in it first joined. It pleads a conclusion of law, and does not state the facts to support it. 3. If claimed to be a plea *puis darrien*, to entitle the defendant to interpose it as matter of right, the record must show that it was offered at the first opportunity. (9 *John*. 255. 10 *id.* 161. 1 *Wend.* 228. 19 *id.* 639. 3 *Denio*, 269.)

II. The exclusion of Williams as a juror was not error. The defendant made no objection to his being excluded. Objections are not noticed on appeal if it does not appear that exceptions were taken expressly and directly to the

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points in question. (*Willard v. Warren*, 17 *Wend.* 257. The exception must not be left to implication. (*Id.* 259.) A party cannot raise an objection on appeal which might have been obviated, if presented below. (17 *Wend.* 234.)

III. The fourth to the eighth points inclusive, made by the appellant in his notice of appeal, furnish their own answers. The ninth, tenth and eleventh are not founded in the facts of the case; and if they were, the rulings were proper.

IV. The contract to pay Voorhees \$50 for his services in the action, was a valid agreement. He had the legal title to the cause of action, by the assignment to him, though the equitable title to the proceeds was in others. Whatsoever may be said of the morality of the transaction, under the peculiar facts of this case, it was not illegal. It is not void as being against public policy. (*Sedgwick v. Stanton*, 14 *N. Y. Rep.* 291, 2.) It was not void for champerty. (*Id.* 291.) It was not void for maintenance. (*Id.* 295.) Maintenance (which includes champerty) is abolished by our statutes, except a prohibition against taking a conveyance of lands in suit, or selling pretended titles, or conspiracies falsely to show or maintain suits. (*Peck v. Briggs*, 3 *Denio*, 107. *Sedgwick v. Stanton*, *supra*. *Durgin v. Ireland*, 14 *N. Y. Rep.* 322.) But the question was not raised in the court below, and cannot be raised on appeal. (*Durgin v. Ireland*, *supra*, 327, 8.)

V. The last point made by the appellant in his notice of appeal arises merely upon the finding of the jury upon a question of fact, where the testimony was conflicting; and that finding is conclusive.

*By the Court*, JOHNSON, J. The principal question in this case, is, whether the agreement between the plaintiff and the defendant, for the prosecution of the action in this court, in the name of the former, against McCartney, can be enforced. According to the verdict of the jury the

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transaction was this: Canfield claimed to have a demand against McCartney, which he wished to have prosecuted, as he was about to leave the state. It was finally arranged between the plaintiff and defendant, and Canfield, that the latter should assign his claim, to the plaintiff, and that the defendant should prosecute the demand as attorney in the plaintiff's name, but the plaintiff was to have no interest in the moneys recovered by such action. It was also agreed between the plaintiff and the defendant that the defendant should pay the plaintiff \$50, whenever the action was determined, and pay his necessary expenses in attending court. His compensation for the time spent in attending court was to be included in the \$50, and he was to be saved harmless from all costs and expenses of the litigation. The action was tried at the circuit and the plaintiff was nonsuited. This action was then brought in a justice's court, to recover the \$50, and certain expenses incurred in attending the trial personally, at the request of the defendant, and moneys paid out in procuring the attendance of witnesses at his like request, and for other services rendered and moneys paid to and for the defendant. The plaintiff had a verdict in the justice's court, and the judgment, thereon rendered, was on appeal affirmed in the county court. The defendant claims that this agreement for the prosecution of the action against McCartney is illegal and void and cannot be enforced by action.

The demand was assigned to the plaintiff, in order that the action might be brought and maintained in his name. This invested him with the legal title to the chose in action, though under the arrangement his right would be that of a trustee of an express trust only, according to section 113 of the Code. The arrangement between the parties, so far as the plaintiff is concerned, falls exactly within the general definition of maintenance. It was an action in which he had no interest, but consented officiously to intermeddle with it, and afford the use of his name for a con-

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sideration. If maintenance is not against law, the consideration is sufficient to uphold the agreement and furnish a ground for recovery. It has been held that illegal maintenance does not exist except in the single case mentioned in the Revised Statutes, and that such maintenance was repealed or abrogated by those statutes. (*Sedgwick v. Stanton*, 14 *N. Y. Rep.* 289. *Durgin v. Ireland*, *Id.* 322.)

The agreement here, does not fall within the condemnation of the statute, and being in no respect contrary to any existing law, I see no reason why it should not be enforced. It contemplated, in addition to the use of the plaintiff's name, and the liability necessarily incurred for the costs, to the opposite party, certain services to be rendered by the plaintiff, in attending court at the time of trial, which were in fact rendered. There is nothing necessarily immoral, or censurable, in aiding and assisting another in the prosecution and collection of a just claim, or one which is believed to be such, by the party assisting, where such assistance is sought in good faith by the party so assisted. On the contrary, such acts from good motives, and for just ends, may be as commendable and praiseworthy, as any other acts of benevolence and kindness. It is the bad motive, and the unjust end sought to be attained, which renders such acts immoral and reprehensible. Even before the Revised Statutes, when the law against maintenance was in full force, many acts in the nature of maintenance were held to be justifiable from the circumstances under which they were done. There were no less than five exceptions to the general rule, within which assistance in the nature of maintenance could be lawfully furnished. And the rule itself, having long survived the evil it was intended to remedy, was very properly abrogated, except so far as the statute has preserved it. The plaintiff was not, therefore, when he entered into this agreement with the defendant, guilty of doing an illegal act, as he seems to have believed. It was not barratry on the part of the plaintiff,

because it is but a single instance, and that offense consists in the practice or habit of stirring up such strife.

The defendant also cites, and insists upon, by way of defense, the provisions of the Revised Statutes forbidding attorneys, counsellors, and solicitors buying rights in action to prosecute, or lending or advancing money or things in action to procure suits, and making all such acts misdemeanors, and subjecting such attorney, counsellor, or solicitor, to removal from office in the several courts in which he is licensed. (2 R. S. 288, §§ 71-73.) And he invokes in his behalf the application of the maxim *Ex turpi causa non oritur actio*. But I do not see that the case falls within either of the sections of the statute, or within the scope of the maxim cited. It was clearly not a purchase of the demand by the defendant as an attorney; nor was it in fact a loan or advancement, or an agreement to lend or advance any thing, by way of inducement, or as a consideration to the owner of the claim, to place it in the plaintiff's hands for collection. The promise to pay the \$50, was not by way of inducement or consideration to the assignment, but simply as a compensation for consenting to stand as a nominal party in the action, and certain services to be rendered in the progress thereof. Here, again, it appears that the defendant, who is also an attorney and counsellor of this court, "builted better than he knew," and was innocent in law, if not in intent, of the turpitude he urges against himself, by way of defense to the action.

The other points relate to the rulings in the course of the trial. There was no error in allowing parol evidence to be given of the letter. The witness stated that it was lost, and he could not tell what had become of it. He was not cross-examined for the purpose of ascertaining where he kept his letters, or whether he preserved them at all, or what search he had made; but the objection was, that there was no evidence that it had been destroyed, or that

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the witness had searched for it where he usually kept his letters. The witness stated generally that it was lost, which was sufficient evidence, *prima facie*, of loss. A further examination might have disclosed an insufficient search for the letter, in the place where such things were usually kept by the witness, but the defendant did not see fit to make any inquiry.

As to the rejection of Williams, as a juror, it is enough to say that there is nothing in the case, whatever, to show that he was not rejected with the consent of the defendant. It does not appear that the defendant insisted upon his sitting, or made any objection, or took any exception to his exclusion. It is altogether too late to raise an objection, or take exception, upon appeal, in such a case.

The evidence is, on the whole, I think, sufficient to sustain the verdict. It was, indeed, quite conflicting, but the jury has determined which version was entitled to credit. It is not a case where the preponderance is so decisive against the verdict, as to raise the presumption of prejudice or corruption on the part of the jury, and the court would not be justified in setting it aside as wholly against evidence.

The foregoing embraces all the points contained in the printed brief. Some other questions were urged upon the oral argument which were raised in the notice of appeal to the county court, but I am unable to discover any error in either of them, and am consequently of the opinion that the judgment of the county court should be affirmed.

[MONROE GENERAL TERM, September 7, 1868. *E. D. Smith, Johnson and J. C. Smith, Justices.*]

THE PEOPLE OF THE STATE OF NEW YORK, *vs.* ALONZO SNYDER.

Where it is proved, in an action of ejectment brought by the people, that an individual under whom the defendant claims title, was not an alien, but a naturalized citizen, both at the time of the grant to him and of his grant to the defendant's grantor, the people, in their sovereign capacity, should be presumed to have known that fact; especially where it appears that such person had represented, and exercised, their sovereignty, both in the legislative and judicial departments of the government for a number of years.

The treaty between the United States and the government of Great Britain, commonly known as Jay's treaty, concluded and ratified by our government in 1794, expressly provided that British subjects, then holding lands in the United States, should continue to hold them according to the nature and tenure of their respective estates and titles in such lands, and might grant, sell or devise the same, as they might respectively choose to do. When this treaty was ratified, it became a part of the supreme law of the land, and rendered the title of every alien British subject, to lands in every part of the United States, then held, not only valid, but alienable by him, the same as though he had been a native born or naturalized citizen.

The act of the legislature of this state, passed April 20, 1798, expressly authorized the conveyance of lands to aliens, and made conveyances to them valid to vest the estate thereby granted, in such alien, "to have and to hold the same to his, her or their heirs and assigns forever, any plea of alienism to the contrary notwithstanding." (4 *N. Y. Stat. at Large*, 294.)

Under this statute Sir William Pulteney, who was an alien, took and held a perfectly valid title to all the lands embraced in the deed to him from Charles Williamson and wife, dated March 31, 1801; he having complied, fully, with the conditions prescribed in the second section of the aforesaid act, and had his conveyance recorded, in the office of the secretary of state, within twelve months after the date thereof.

The complete and perfect validity of the title, in Sir William Pulteney, has been often affirmed by the courts of this state; and the whole question having been carefully examined, and the validity of the title distinctly affirmed, in the case of *The Duke of Cumberland v. Graves*, (7 *N. Y. Rep.* 305,) that decision, by the court of last resort, ought to put the question of the validity of such title at rest, forever. *Per* JOHNSON, J.

Where, in an action of ejectment brought by the people, it was admitted by the pleadings that a third person held the title of the premises, in 1792, and that consequently it was then out of the plaintiffs, if they had ever been invested with it; *Held* that the mere fact that the lands in question were at the time of commencing the action unoccupied and uncultivated, raised no presumption whatever that the plaintiffs had become re-invested with such title. The presumption in such a case is, that the title remains out of the plaintiffs, until the contrary is shown, affirmatively. The burden of proving reinvest-

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ment is on the plaintiffs. The fact that the land is wild, and not actually occupied by any one, works no forfeiture of title, and no escheat. Nor does it raise any presumption in the people's favor, where they are shown to have been once divested.

In an action of ejectment, brought by the people, the plaintiffs cannot recover upon the ground that the Indian title to the lands in question has never been extinguished; where it is not pretended that the state has ever acquired the Indian title, by any purchase or treaty, but on the contrary, it is claimed that the fee of such lands is still in the six nations of Indians.

THIS is an action of ejectment commenced in November, 1864, to recover a parcel of land in Livingston county. The complaint contains five counts, the first and fifth being general. The second, third and fourth counts allege that the premises in question were, by regular conveyances, conveyed to the persons named in the several counts, and that such persons were aliens, wherefore the said premises escheated to the plaintiffs. The defendant, in his answer, alleges that he entered into the possession of said lands as tenant, under William, Earl of Craven, Alexander Oswald, and Edmund Bucknall Estcourt, citizens of the United Kingdom of Great Britain and Ireland; that his possession is in all respects just and lawful; and that there has been an adverse possession by him and his grantors, for more than forty years. The cause was tried at the circuit, in Livingston county, in October, 1866, before Justice WELLES and a jury. The court ordered a verdict for the defendant, upon which a judgment was duly perfected for \$309.03 costs, from which the plaintiffs appealed to the general term.

*Scott Lord*, for the appellants.

*D. Rumsey*, for the respondent.

*By the Court*, JOHNSON, J. The action is ejectment, brought by the plaintiffs to recover possession from the defendant, of about 110 acres of land situate in the



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town of Springwater in the county of Livingston. It is alleged in the complaint, that the defendant entered into possession of the premises in question, under the authority of William, Earl of Craven, and others, in pursuance of a contract made with them, for the purchase thereof. The defendant in his answer, admits that he is in possession under the authority of the said William, Earl of Craven, and others, as alleged in the complaint, and claims that they are the owners in fee simple, and that his possession is in all respects just and lawful.

The theory upon which the action has been brought and is sought to be maintained, as will be seen by looking at the several counts, or causes of action, set forth in the complaint, is, that this land, together with all other lands belonging to what is familiarly known as the Pulteney estate, escheated, and the title became vested in the people of this state, upon the death of Charles Williamson, on or about the 31st of December, 1807. It is alleged in the complaint, that on the 20th of February, 1795, Robert Morris, a citizen of Philadelphia, in the state of Pennsylvania, was seised and possessed of said premises, and that on that day he conveyed them to the said Charles Williamson, who was not, at that time, a citizen of the United States, but a subject owing allegiance to the king of Great Britain, &c. It is admitted in the answer that Morris held the land in fee simple, under a conveyance from Nathaniel Gorham and Oliver Phelps, and that he conveyed the same in fee simple to the said Charles Williamson, and that said Williamson conveyed the same by deed in fee simple on the 31st of March, 1801, to Sir William Pulteney. It seems to stand admitted, therefore, by the pleadings, that the title to the premises in question, was out of the plaintiffs, and in certain individuals, at the time of the conveyance to Williamson, and prior thereto, and that Williamson conveyed all his right and title to Sir William Pulteney in 1801. This is alleged in the complaint and admitted

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in the answer, and must be taken to be entirely true for the purposes of this action. It was proved upon the trial that Williamson was not an alien at the date of the conveyance to him by Morris, but was a naturalized citizen, having been naturalized in the city of Philadelphia on the 9th of January, 1792. He was therefore capable of taking and holding real estate by virtue of his naturalization, independent of any other question, and of conveying and transmitting the same. The people of this state took no title by reason of his death. It is a part of the history of this state, that Charles Williamson was member of our state legislature representing the counties of Ontario and Steuben in the assembly, for four consecutive years, and sessions, from and including 1796, to and including 1800. He was also first judge of Steuben county from 1796 to 1803 continuously. The alleged alienage of Charles Williamson, and the escheat of these lands to the state upon his death is, I think, the only new feature in this case which distinguishes it, in any material respect, from the multitude of other cases which have come before our courts, during the last half century, in which attempts have been made with more or less vigor and assurance, to assail and overthrow the title vested in Sir William Pulteney by the conveyance to him from Williamson. It turns out as matter of fact, that Williamson was not an alien, but a naturalized citizen, both at the time of the grant to him and of his grant to Sir William Pulteney. This fact the people in their sovereign capacity, should be presumed to have known; especially as it appears that he had represented, and exercised, their sovereignty, both in the legislative and judicial departments of the government for a number of years.

But even if it should be conceded, contrary to the clearly established fact, that Williamson was an alien, never naturalized, such fact would not in the least degree affect the validity of Sir William Pulteney's title, derived through

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Williamson's grant. That grant was made in March, 1801. Williamson derived his title from Robert Morris, who is admitted to have had a title in fee simple, in April, 1792. The treaty between the United States and the government of Great Britain, commonly known as Jay's treaty, was concluded, and ratified by our government in 1794. By that treaty it is expressly provided that British subjects, then holding lands in the United States, shall continue to hold them according to the nature and tenure of their respective estates and titles in such lands, and may grant, sell or devise the same as they may respectively choose to do. The same rights were accorded to citizens of the United States residing in Great Britain. When this treaty was ratified, it became a part of the supreme law of the land, and rendered the title of every alien British subject to lands in every part of the United States, then held, not only valid, but alienable by him, the same as though he had been a native born, or naturalized citizen. Our statute, of this state, passed April 2, 1798, expressly authorized the conveyance of lands to aliens and made conveyances to them valid to vest the estate thereby granted, in such alien, "to have and to hold the same, to his, her, or their heirs and assigns forever, any plea of alienism to the contrary notwithstanding." (4 *N. Y. Stat. at Large*, 294.) Under this statute Sir William Pulteney, who was an alien, took and held a perfectly valid title to all the lands embraced in Williamson's deed to him. He complied fully with the conditions prescribed in the second section of the aforesaid act, and had his conveyance recorded, in the office of the secretary of state, within twelve months after the date thereof. The complete and perfect validity of this title, in Sir William Pulteney, has been so often affirmed by our courts in this state, that it would be a mere waste of time to go over the argument. The whole question was carefully examined, and the

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validity of the title distinctly affirmed, in the case of *Duke of Cumberland v. Graves*, (3 *Seld.* 305.)

Aside from the alleged alienism of Williamson, which is untrue, and wholly immaterial if true, there is nothing new in this case to distinguish it from the case above referred to. That decision, by the court of last resort, ought certainly to put the question of the validity of this title at rest forever. It is idle to expect the court to reverse its decision, in a case where the law and the facts are so clearly and conclusively in favor of the unimpeachability of this title.

Until some new and important fact, the existence of which is not yet known, or suspected, shall be discovered and established, tending to invalidate this title, and impeach its integrity, the agitation of the question can be productive of nothing but evil to individuals, and the most serious injury to the peace, prosperity and happiness of the whole community. The continued agitation of such questions, tends most strongly, everywhere and always, to excite feelings of discontent, of distrust, of apprehension for the security of property and possession, fatal to all persevering industry, to all valuable and permanent improvement of lands, and to the general prosperity of the whole country affected by such agitation. Under its influence, many persons, otherwise well and peaceably disposed, are incited to resort to the desperate and fatal expedient of forcible resistance to the execution of the law, and the process of courts.

The lands embraced in the conveyance to Sir William Pulteney, constitute a large and important portion of the territory of this state, and thousands of titles, and the interests of hundreds of thousands of individuals, depend upon the validity of this title, which should not be assailed, and unsettled at this late day, except upon the most clear, urgent and satisfactory grounds. Least of all, should the state, in its sovereign capacity, through its law officers,

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upon light grounds, and frivolous or unfounded pretenses, be guilty of encouraging such unprofitable, and such dangerous agitation. It should not be overlooked that the plaintiffs in this action, were originally parties in their organized and sovereign capacity, to this very title, which they now seek to repudiate and destroy. They consented to its transfer to Phelps and Gorham, and have since recognized its validity, by repeated acts of legislation. Upon every principle of justice, and fair honorable dealing, they should consider themselves estopped at this day from advancing any such claim. They have acquiesced in the validity of this title and stood by and permitted thousands to purchase and take title from that source, without interposing any claim, for three quarters of a century.

The courts have always, and in very numerous instances, adjudged the title valid and unimpeachable; and never in a single instance to the contrary. Under such circumstances it seems most extraordinary and difficult to comprehend why the state should now advance a claim, at once so futile and so mischievous in all its bearings and tendencies. Most obviously it is not the true policy of any enlightened state, to unsettle titles to land within its borders, or to create distrust in the minds of the people, in regard to the validity of their titles. The plaintiffs do not make out even the shadow of a title to these lands, or cast the faintest cloud over that under which the defendant claims. It stands admitted upon the face of the pleadings, that Robert Morris held the title in fee in 1792. Of course it was then out of the people of this state, if they had ever been invested with it. This being so, the mere fact that the lands in question in this action, were at the time of the commencement of such action, unoccupied and uncultivated, raises no presumption whatever that the plaintiffs have become reinvested with such title. The presumption, in such a case, is that the title remains out of them, until the contrary is shown affirmatively. The

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burden of proving reinvestment was on the plaintiffs, and they show nothing, except that the land is wild, and not actually occupied by any individual. This works no forfeiture of title, and no escheat. Nor does it raise any presumption in the people's favor, where they are shown to have been once divested.

Another point is raised, I think, for the first time in the history of the litigation upon this title, which is that the Indian title to the lands in question has never been extinguished. This seems to be a clear departure from the theory of the complaint, and entirely against the admission in the pleadings, that the title was vested in Robert Morris in 1792; to say nothing of the evidence in the case on the subject of the cession of these lands by the Indians.

It is claimed by the plaintiffs' counsel that the fee of these lands is still in the six nations of Indians. But if this is so, it is not shown how that fact can aid the plaintiffs in the recovery in this action. The state, as is well known, has always extinguished the Indian title to lands within its borders, by purchase, through a treaty, and required individuals to do so. It is not pretended the state has ever acquired the Indian title to these lands by any purchase or treaty, and if it be true that the fee is still in the Indians, I do not see why that is not entirely fatal to the right of recovery in this action. It is not pretended that the territory has been usurped, by the defendant, or those under whom he claims, and the state dispossessed of its right of governmental sovereignty. I do not deem it necessary in this case to decide the question whether the Indian title was an absolute fee, or otherwise, because I am unable to see how that question can affect the rights of the parties to this action. I suppose, however, that no one will contend that the state could maintain an action of ejectment to dispossess the Indians from their lands, in the reservations occupied by them, or against any individual occupying a portion of such lands with the consent of

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the Indians. It is clear enough that the Indians surrendered these lands, now in question, and gave up possession under their treaty to the persons under whom this defendant claims. They were never ceded to the people of the state, and the plaintiffs have never before claimed to be owners of the fee.

Several questions were raised in the course of the trial, in regard to the admissibility of evidence offered and received, or offered and rejected, which I shall not here notice in detail. I have examined them all carefully, and do not think any of them well taken. Most of them, if not all, have been raised and decided in the same way repeatedly, and would be considered as settled beyond all doubt or possibility of cavil on any other subject of litigation.

The judgment must, therefore, be affirmed.

[MONROE GENERAL TERM, September 7, 1868. *E. D. Smith, Johnson and J. C. Smith, Justices.*]

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STEPHEN J. CHASE, executor, &c. vs. JAMES EWING and  
MARY A. EWING.

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"Advancement" and "advancements," are the terms used in the law dictionaries, and in our statutes, to designate money, or property, given by a father to his children, as a portion of his estate, and to be taken into account in the final partition or distribution thereof. "Advances," is not the appropriate term for money or property thus furnished. The latter phrase, in legal parlance, has a different and far broader signification. It may characterize a loan, or a gift, or money advanced to be repaid conditionally. *PER JOHNSON, J.*

A testator, by the third clause of his will, devised and directed as follows: "Whatever advances I have made to any of my children, or to the husbands of any of my children, for which any receipts or other evidences of indebtedness may be found among my papers after my decease, I hereby give and devise to my said children, to each one the advance made to each; my intention being by this that such receipt or other evidence of indebtedness,

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shall not be collected or enforced against them, or either of them, who may have signed the same, but that the same be given up to that one of my children, who may have in person, or whose husband may have signed the same, the receipt or other evidence as aforesaid of each to each." *Held*, that the entire tenor and scope of the clause, showed clearly that the testator had in view not gifts and advancements previously made as such, but advances only, in the nature of loans, and for which he held vouchers whereby the claims could be enforced. And that it embraced, under the term "evidence of indebtedness," a mortgage given by one of the testator's children with her husband, for money borrowed of the testator.

*Held, also*, that the mortgage purporting on its face to be given "in consideration of the sum of \$2166, to them [the mortgagors] duly paid," and reciting, in the condition, that "this grant is intended as a security for the payment of \$2166, payable in one year from the date hereof, with interest, which payment, if duly made, will render this conveyance void," it was of itself evidence, upon the trial, not only of the indebtedness, but also of the default in payment; and was therefore the identical thing described in the third clause of the will—an evidence of indebtedness for "advances;" and could not be enforced.

*Held, further*, that in an action by the executor of the mortgagee, to foreclose such mortgage, the plaintiff could not be allowed to give in evidence the declarations of the testator, for the purpose of proving that the indebtedness secured by the mortgage was a loan and not an advancement to the defendants, or one of them.

And that inasmuch as, had the action been brought by the testator in his lifetime, his parol admissions, or declarations, that the money had been furnished by way of advancement, and not as a loan, would have been inadmissible, on the ground that they would contradict the plain terms and legal intentment of the mortgage, they were equally inadmissible in an action of foreclosure brought by his executor.

Conversations and declarations of a testator, in favor of the executor are never allowable in actions between the executor and third persons, unless under some peculiar circumstances.

**A** PPEAL from a judgment entered upon the report of a referee. The action was brought by the plaintiff, as executor of Stephen Chase, deceased, to foreclose a mortgage given by the defendants to the testator, to secure the payment of \$2166, with interest.

The following facts were found by the referee:

That on or about the 2d day of April, 1851, the defendants, James Ewing and Mary A. his wife, executed, acknowledged and delivered the mortgage in the complaint



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mentioned to the plaintiff's testator, Stephen Chase, therein named. That the said James Ewing on the 2d day of April, 1851, paid the said Stephen Chase the sum of \$151.62 on said mortgage, being the interest for one year thereon, and which became due on that day. That on or about the 31st day of May, 1852, the said Stephen Chase made, published and declared his last will and testament in writing, bearing date on that day, and containing a clause of which the following is a copy:

"*Third*, Whatever advances I have made to any of my children, or to the husbands of any of my children, for which any receipt or other evidences of indebtedness may be found among my papers after my decease, I hereby give and devise to my said children the advance made to each. My intention being by this that such receipt or other evidence of indebtedness shall not be collected or enforced against them, or either of them who may have signed the same, but that the same be given up to that one of my children who may have in person, or whose husband may have signed the same, the receipt or other evidence as aforesaid of each to each." That the said Mary A. Ewing is one of the children of the said Stephen Chase, and that at the time of the execution and delivery of the said mortgage the said James Ewing was and still is the husband of the said Mary A. Ewing. That on the 2d day of February, 1853, the said James Ewing and Mary A. his wife, conveyed to the said Stephen Chase, for a consideration of \$1000, in such conveyance expressed, a part of the mortgaged premises in the said mortgage described, and known and distinguished as lots Nos. 57 and 58, in the village of Dresden. That on the same day the said Stephen Chase conveyed the said lots Nos. 57 and 58, to the said Mary A. Ewing for a consideration of \$1000 in said conveyance expressed, and released the said lots Nos. 57 and 58 from the lien and operation of said mortgage. That on the said 2d day of February, 1853, the said

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Stephen Chase executed an indorsement upon the said mortgage of which the following is a copy :

"\$500. Rec'd on this mortgage five hundred dollars in this way. Desiring to give my daughter, the wife of James Ewing, within named, five hundred dollars, I have taken from them a deed of two of the lots within mentioned, and have conveyed the same to my said daughter Mary A. and have released the said two lots, 57 and 58, from the operation hereof, and the consideration of said deed is this gift and \$500, before this given to her.

Dated, Feb. 2d, 1853."

That no payments other than the said \$151.62 so paid by said James Ewing to said Stephen Chase and the said sum of \$500 mentioned in said endorsement, have ever been made on the said mortgage.

That prior to the 15th day of April, 1853, the said Stephen Chase died in the county of Ontario and state of New York, leaving his said last will and testament unchanged and unrevoked. That on the said 15th day of April, 1853, the said last will and testament was proven before, and admitted to probate by the surrogate of said county of Ontario, and letters testamentary thereon granted and issued by him to the plaintiff as sole executor thereof, and that thereupon the plaintiff qualified and entered upon the discharge of his duties as such executor. That the said mortgage was not a receipt or an evidence of indebtedness given for any advance or advancement made by the said Stephen Chase to the said James Ewing and Mary A. his wife, or either of them. That the sum of \$2166 mentioned in the condition of said mortgage was not, nor was any part thereof, an advance or an advancement made by the said Stephen Chase to the said James Ewing and Mary A. his wife, or either of them. That the sum of \$3458.07 is now unpaid on the said mortgage, all of which has become due.

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The referee's conclusions of law were as follows:

That the said mortgage is not one of the receipts or other evidences of indebtedness, mentioned and described in the third clause of the said last will and testament of the said Stephen Chase, deceased. Nor was the amount mentioned in the condition of the said mortgage, or any part of such amount an advance or advancement made by the said Stephen Chase, to the said James Ewing and Mary A. his wife, or either of them. That the said mortgage was not in or by said last will and testament canceled or invalidated. That upon the probate of the said last will and testament and the issuing of letters testamentary thereon to the plaintiff as sole executor thereof, the said mortgage became and was and still is a valid asset in the hands of the plaintiff as such executor. That the said plaintiff is entitled to judgment. That the defendants in said action and all persons claiming under them subsequent to the commencement of said action, be barred and foreclosed of all right, claim, lien and equity of redemption in the whole of the said mortgaged premises, except the two lots, Nos. 57 and 58 in the village of Dresden, so released as aforesaid. That the said premises, except the said lots, Nos. 57 and 58, be sold according to law. That the moneys arising from such sale be brought into court. That the plaintiff be paid the said sum of \$3457.08, so unpaid on said mortgage, with interest on said sum to the time of payment, together with his costs and expenses in this action, so far as the amount of such moneys, properly applicable thereto will pay the same; and that the said defendant James Ewing, pay the plaintiff any deficiency which may remain unpaid of the said costs and expenses after applying the said moneys as aforesaid. And the referee directed that judgment be entered accordingly.

On the hearing, before the referee, the plaintiff offered to prove the declarations of Stephen J. Chase, the testator, which testimony was objected to by the defendants, and

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the objection overruled and the evidence received; to which ruling the defendant excepted.

At the close of the plaintiff's testimony the defendants moved that the plaintiff's complaint be dismissed; which motion was overruled, and the defendants excepted.

The defendants appealed from the judgment.

*D. B. Prosser*, for the appellants. I. The referee erred in refusing to dismiss the plaintiff's complaint, at the close of the plaintiff's evidence. Because, 1. The mortgage was evidence of an indebtedness within the words of the will of the plaintiff's testator. Before the plaintiff could recover on the same, he should have shown that the mortgage was not given for advances made by the deceased to Ewing. 2. The authority of the plaintiff having been wholly derived from the will, and that expressly declaring that any evidence of indebtedness which should be found among his papers at the time of his death *should not be collected*, but should be given up, the right of the plaintiff to enforce the collection of the mortgage depended wholly upon the question, whether the mortgage was or was not given to secure advances made by the deceased to Ewing or his wife. 3. There being nothing on the face of the mortgage showing what the consideration was, or how the debt, to secure which it was given, arose, the plaintiff was bound to show that it had not been given to secure advances, or, in other words, what the consideration was, especially as the mortgage bore date prior to the will. 4. Unless there was a debt, there could be no mortgage, and the mortgage must furnish the evidence of the indebtedness. (4 *Kent's Com.* 159, 193.) The mortgage may not furnish evidence of a personal obligation, yet it must be evidence of a debt or obligation. Here the mortgage expressly provides that, upon the payment of the sum of \$2166 and interest, it was to become void, the debt being the principal thing.

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When that is discharged, the mortgage ceases to be operative. Money loaned is money advanced, in the strict sense of the term advanced. The words used by the testator are to receive the proper meaning, in giving construction to the will, unless there is something limiting the meaning of the words. Here there is not any thing of the kind. On the contrary, the words used are the most sweeping and comprehensive that could have been selected by the testator, being "*other evidences of indebtedness.*" A simple receipt for advances made, by way of advancement or portion, would not afford any evidence whatever of any debt or obligation. It is, therefore, manifest, that the testator meant something more than such a receipt. He must have intended what the words import, a debt or obligation which could be enforced and collected by action. The plaintiff having failed to show that the mortgage in question was not given for money advanced by the testator to Ewing or his wife, his complaint should have been dismissed by the referee.

II. The referee erred in receiving evidence of the declarations of the deceased, the plaintiff's testator. Because, 1. They were the same as evidence of the declaration of the plaintiff, made in the absence of the defendants, the plaintiff, as executor, simply representing the deceased and his estate. 2. The declaration of a former owner of a chattel, is never admissible in evidence, although such former owner may be dead at the time. (*Beach v. Wise*, 1 Hill, 612. *West v. Hurd*, 7 Cowen, 752. *Paige v. Cagwin*, 7 Hill, 361.) 3. If the evidence was offered or given for the purpose of explaining the meaning of the words used in the will, they were clearly inadmissible for that purpose. There is no ambiguity nor uncertainty in the words, and they must be presumed to have been used by the testator, with full knowledge of their force and effect. (*Williams v. Crary*, 4 Wend. 451. *Mann v. Mann*, 1 John. Ch. R. 231. *Cromer v. Pickney*, 3 Barb. Ch. R. 466. *Hone v. Van*

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*Schaick*, 3 Comst. 538.) In *Hone v. Van Schaick*, (*supra*), Gardner, judge, on page 540, says: "The language of the testator should be construed according to its primary and ordinary meaning, unless the testator has manifested his intention, in the will itself, to give a different and more extended signification, and this rule is affirmed by all the authorities. I add, such words cannot be restricted nor enlarged by parol evidence of the testator's intention. *Williams v. Crary*, (4 Wend. 448.) It therefore follows, that the evidence of the declarations of the testator, objected to by the defendants, should have been excluded.

III. The referee erred in finding, as a conclusion of fact and of law, that the mortgage was not an evidence of indebtedness, as mentioned and described in the third clause of the will of Stephen Chase, deceased; because, it will be remembered, the words of the will are receipts or other evidences of indebtedness, and the evidence, so far as there was any, for what the mortgage was given, is that it was given for money advanced by the deceased to Ewing. There is not a particle of evidence tending to show for what the mortgage was given, aside from the evidence, on the part of the defendants, that it was given for money advanced to Ewing to help him.

IV. The referee erred in finding, as a conclusion of law, that the amount mentioned in the mortgage, or any part of it, was not for advance or advancement by the deceased to Ewing or his wife. The evidence shows, most conclusively, the sum mentioned in the mortgage was for money advanced to Ewing by the deceased, although the referee has found that the sum mentioned in the condition of the mortgage was not for money advanced, or for an advancement, yet he has wholly failed to find what it was given for, or how the debt arose. If the referee had found what the sum mentioned in the mortgage was for, the court then might have been able to judge, from such finding, whether it came within the third clause of the will. It is

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not claimed or pretended that it was given for an advancement, by way of portion to Ewing or his wife. The language of the will does not require that it should have been such, in order to have been discharged thereby. Such an advancement creates no legal obligation, upon which an action could be sustained, and no necessity for declaring in the will that it should not be collected.

V. The referee erred in sustaining the objection, on the part of the plaintiff, to the question put to the witness Ewing on the part of the defendants, and in excluding the evidence offered on the part of the defendants. The offered and rejected evidence does not fall within any of the provisions of the 399th section of the Code. It was simply to prove that the mortgage in question was made, executed and recorded before the deceased had knowledge of its existence. This was neither proving a transaction nor communication had between the witness and the deceased. The witness had already testified, without objection, that he executed that mortgage, that it was drawn by him, and that it was a voluntary act on his part. The offered and rejected evidence was necessary, to explain what had been testified to without objection, and was competent for that purpose, if no other.

*Charles J. Folger*, for the respondent. I. It is apparent that the burden of proof is upon the defendants. It is for them to show that this mortgage is an advancement. The mortgage is *prima facie*, a valid asset in the hands of the executor. It is for the defendants to show that it is within the language of the will. They must establish either from the plain reading of the will, or extrinsic of it, that the testator meant to give this mortgage to his daughter, the defendant, Mrs. Ewing.

II. It is quite certain that there is nothing in the will itself, which of necessity gives this mortgage to her. She cannot, without proof outside of the language of the will,

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show to a court that the testator intended to give her this mortgage. To bring the mortgage within the words of the will, it must be an advance. More than that, it must be an advance, for which a receipt or evidence of indebtedness shall be found among the testator's papers. 1. There is nothing in the will; there is nothing in the mortgage to show that it was an advance to Ewing. (*Van Alstyne v. Van Alstyne*, 28 *N. Y. Rep.* 378.) 2. If it should be granted that it was an advance, still, there is nothing in the mortgage making it a receipt or an evidence of indebtedness. Hence it is not an advance for which a receipt or evidence of indebtedness is found among the papers of the testator. It is submitted that two things must exist and concur, before this mortgage can be said to come within the provisions of the will. It must be an advance. It must, also, be an advance for which a receipt or evidence of indebtedness is found. Clearly, this mortgage is not a receipt. It does not comply with any legal idea, or common notion, of the instrument known as a receipt. It is not an evidence of indebtedness. It is simply a mortgage—a conveyance with a condition. It does not create any indebtedness; it does not acknowledge that any exists. There is not a word or phrase in it upon which any action could be founded against Ewing, in which to charge him for the amount of money, or any part of it, named in the condition. (*Culver v. Sisson*, 3 *Comst.* 264. *Weed v. Covill*, 14 *Barb.* 242. *Hone v. Fisher*, 2 *Barb. Ch.* 559. *Bunner v. Storm*, 1 *Sandf. Ch.* 357.) As a question of fact, the referee has found, that the mortgage is not a receipt or an evidence of indebtedness. He has also found as a question of fact that the money secured by the mortgage was not an advance.

III. Nor can the defendants rely upon proof, oral or otherwise, *aliunde* the will and the mortgage, to show that the money mentioned in the mortgage was an advance.

1. Such proof is not admissible in the case. (*Cromer v.*



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*Pinekey*, 3 Barb. Ch. 466. *Waterman v. Whitney*, 1 Kern. 157-165. *Hyatt v. Pugsley*, 23 Barb. 285.) There is nothing in the will which needs explanation by parol proof. Its terms are explicit. Its description is precise. The only question is, does the mortgage come within its terms and answer its description? The testator meant to give to his children the advances he had made to them, when and only when, such advances were shown by written paper to be found among his effects. He meant that not only should the paper be found among his effects, but that it, and it alone, should declare that it was given for an advance. Now, to take a paper which shows no such thing, and to eke it out by parol proof, is to add to the words of the will not only, but is to vary the effect of the mortgage. Parol proof is not admitted to explain an obscurity in a will where that obscurity is purely instrumental. (23 Barb. 297.) If it is claimed that the parol proof is offered, not to alter or explain the will, but to show that this mortgage was meant by the will, and pointed to by it as an advance, the answer then is, grant that it is in fact an advance, grant that the parol proof will show it so, still it is not every advance that passes by the will, but only advances for which there shall be found receipts or evidences of indebtedness. And if parol proof is needed to show that this mortgage was for an advance, it must be for the reason that the mortgage itself contains no words expressive of that fact. And if so, then the parol proof must add to or vary the mortgage; must put into it words, which the will requires should be found there without extrinsic proof.

There is no ambiguity in the will such as to require extrinsic proof to explain it. The terms of the will are explicit. They indicate papers (receipts and evidences of indebtedness,) well known to legal and business transactions. And the proofs in the case show that there did exist among the papers of the testator, just the kind of

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instruments which the unvaried terms of the will would indicate. (*Smith v. Smith*, 1 *Edw. Ch.* 189.) 2. And further even if parol proof is admitted of the declarations of the testator, they cannot be applied to the mortgage so as to make it an evidence of indebtedness and then bring it within the terms of the will. It is apparent that the mortgage must be, in and of itself, a receipt or an evidence of indebtedness, or it is not embraced within the terms of the will. Parol proof may be able to show that the mortgage was given for a loan, was given for any indebtedness, but this does not make the mortgage itself an evidence of indebtedness. It could show no more than that an indebtedness existed, and that the mortgage was taken for it. But it cannot transmute the mortgage from a mere pledge, or security on real estate, for the payment of an indebtedness, into an instrument, which shall in and of itself evidence and express the fact of that indebtedness. It is after all the parol proof and it alone, which evidences the indebtedness, and the mortgage is, upon that point, as mute and inexpressive as ever. The parol proof cannot be interpolated into the mortgage so as to become a part of it, and to be read with it, and until this is done, the mortgage does not and cannot become either a receipt or an evidence of indebtedness.

IV. But even on the extrinsic evidence, the preponderance of the acts and declarations of the testator is with the plaintiff that it never was the intention of the testator to bequeath this mortgage to Mrs. Ewing. 1. The receipts and evidences of indebtedness which are produced by the plaintiff, and which were found among the papers of the testator. These show that there did, when the will was made, exist papers which corresponded exactly with the terms of the will, and with the idea in the mind of the testator. The provision in the will for his daughter, Mrs. Bowers. She had received of him only \$200 as the receipts show. So in the will he provides that she shall

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have \$800 more than the rest out of the general division of his estate, making her sum \$1000, equal to that of Mrs. Tuttle and about that of Mrs. Warner. And as to Mrs. Ewing, from whom there is no receipt, he made out her amount by release of part of mortgaged premises. 2. The doings of the testator in his lifetime with this very mortgage. (a.) On 2d April, 1852, he received and indorsed the interest. This was past a year from its date, and the amount received was just the interest for one year. He thus treated it as a valid subsisting security in his hands, and as a source of annual income to him. (b.) On the 2d February, 1853, he deals most significantly with this mortgage. And bear in mind that this was after the will was made, which was 31st May, 1852. In February, 1853, with full knowledge of the provisions of the will, with the expressed desire of giving to his daughter, Mrs. Ewing, \$500 more, so as to make his gifts to her \$1000, he releases from the mortgage two parcels of the land described in it, and has them conveyed to her separately. But why give her two of the lots in the mortgage, if by the will he had already given her the whole mortgage debt, more than four times the value of the two lots. The reason is plain. He had not yet given her \$1000 to make her equal with her sisters. No receipt is found from her. In this way, then, he makes *her advance*. And note that when the will in its third article speaks of advances *I have made*; it means advances which the testator *had made before its date*. (*Van Alstine v. Van Alstine*, above cited.) So that the dealings of the testator with this mortgage subsequent to the date of this will, are very significant. 3. The oral testimony preponderates also in favor of the plaintiff.

V. The referee has found the facts to be, that the mortgage was not a receipt, or evidence of indebtedness given for an advance or advancement, nor was the money mentioned in the condition of it, nor any part of it, an advance or advancement, made by the testator to Ewing and his

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wife, or either of them. This precludes the necessity of discussion upon the testimony.

VI. But it is claimed that the referee who tried the cause erred in admitting, and that the referee who decided it, erred in considering the proof of the plaintiff of the declarations of the testator of the plaintiff in regard to this mortgage. As to this it is to be observed, 1. That this evidence on the part of the plaintiff was solely in rebuttal of evidence introduced by the defendant. Although it was in reality introduced to the referee before that of the defendant, it was in anticipation of the testimony of the defendant to be obtained and used on commission. It appears from the case that the plaintiff rested upon introducing his documentary evidence. The defendants then offered the deposition of Henry Bower and Margaret Bower taken on commission. These were ruled out on a *technical objection*, and it was in anticipation of the defendants' case, and to rebut the same, that the plaintiff's testimony of declarations was given. If the testimony by the defendants, of the testator's declarations, is competent, was not like testimony by the plaintiff? It is attempted to distinguish by saying that such testimony by the plaintiff is in effect the giving in evidence of one's declarations in his own favor, while such testimony from the defendants is the giving in evidence of declarations of one against himself, and adverse to his interest. But this is not sound. Up to the testator's death this whole matter was in his power, and a slight act of his could have obliterated this third article of his will, or canceled the whole instrument, and then the mortgage would certainly have been an asset in the hands of an executor or administrator. Hence his declarations cannot be said to be for or against his own interest. With the whole subject matter in his own power, no such question can arise. (*Thomas v. Thomas*, 6 T. R. 671. *Williams v. Crary*, 8 Cowen, 246, 248. *Trimmer v. Bayne*, 7 Vesey, Jr. 508. *Smith v. Montgomery*, 5 Mon. 502.)

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2. But if it is true, that the party to the action, who is the privy of the testator, is precluded from giving in evidence the declarations of the testator, is it not the defendants rather than the plaintiff who are thus affected? The plaintiff represents the estate, the creditors of the estate, all the residuary legatees. The defendants claim as the particular and immediate legatees of the testator, and they are chargeable with all the proof which can be made from his declarations, because these declarations affect the very instrument which they claim to take as legatees from him, and thus to divert from the general fund of the estate.

3. But the declarations of the testator are not to be admitted for or against the plaintiff or the defendants on any such principle. They are to be admitted, if at all, to explain an ambiguity in the will, and in that case are to be admitted for one party as well as the other. (1 *Phil. on Ev.* (C. & H. Notes,) pp. 314-317, n. 104, and cases there cited. 2 *id.* 768. *Betts v. Jackson*, 6 *Wend.* 173.)

VII. Further, it is to be noted that the plaintiff is an executor seeking to enforce an asset of the estate he represents. The defendants are resisting his claim on the ground that they are legatees of this asset. But legatees cannot claim in priority to creditors. The executor represents the creditors and is acting for them. Creditors have the first right to the estate. Non-constat in this case that the assets of the estate are sufficient to pay the debts of the estate, and until that appears, the legatee cannot claim. Until the debts are paid, legatees cannot claim their legacies. Nor can debtors to the estate ask to be absolved from payment of their debts to it, until it appears that the estate can pay its debts. If by "advance" in the will, it is claimed by the defendants is meant a *loan*, then it was a loan until the death of the testator, and his will by his death became operative. But the testator could not by making loans, and then in his will making them legacies, defeat the rights of his creditors to have the assets of his

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estate applied to the payment of their debts. Before the defendants can resist the collection of this mortgage they must show that there are assets enough, other than those effected by this clause of the will, from which the executor may pay the debts of the estate. (3 R. S. 171, 5th ed. § 15. *Margin* 2 R. S. 84, 14.) Could the defendants maintain an action against the plaintiff as executor, to compel him to cancel and surrender this mortgage, without averring and showing that all debts against the estate were paid, or that the executor had funds sufficient to pay them? They could not. (*Tole v. Hardy*, 6 Cowen, 339.) How, then, can they defend without making the same proof?

VIII. From all these reflections it follows that the defendants cannot maintain their defense. The plaintiff should have judgment of foreclosure and sale according to the prayer of the complaint. There is also the general prayer for relief, and under this the judgment should give the costs of the litigation to the plaintiff, against the defendant James Ewing personally. It may be that the property mortgaged will not pay the mortgage debt and the expenses of sale, and it would seem equitable as there is no personal security, so that there can be no judgment over for the deficiency, that the judgment should give costs to the plaintiff against the defendant James Ewing, personally. It is he that has by an unfounded defense made the costs. (11 Barb. 350. *Park v. Peck*, 1 Paige, 477.)

*By the Court*, JOHNSON, J. "Advancement" and "advancements" are the terms used in the law dictionaries, and in our statutes, to designate money or property given by a father to his children, as a portion of his estate, and to be taken into account in the final partition or distribution thereof. "Advances" is not the appropriate term for money or property thus furnished. The latter phrase, in legal parlance, has a different and far broader signifi-

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cation. It may characterise a loan or a gift, or money advanced, to be repaid conditionally. "Lent and advanced" was the language of the old common count, in *assumpsit*, for money loaned or advanced, to be repaid.

Taking the whole of the third clause of the will into consideration, it would seem pretty clear that the testator did not intend to speak of advancements made to his children, but of advances for which he held "receipts or other evidences of indebtedness," which might be found among his papers at his decease. If the claims, thus spoken of, had been advancements, there could have been no evidences of debt existing in reference to them, for an advancement, creates no debt to the person making it, and in all its features, and in its very nature, is distinguishable from a debt or an indebtedness. Again, these "advances" are given as bequests, by the very terms of the will: "I hereby give and devise to my said children the advance made to each." This clearly implies that the thing given was something not before given or disposed of, which belonged to him, and which, if not so given, would go to his executor. And to make this more clear, he says: "My intention being by this, that such receipt, or other evidence of indebtedness, shall not be collected or enforced against them, or either of them, who may have signed the same, but that the same be given up," &c.

Here it is, in express terms, that "evidences of indebtedness," for "advances," are not to be enforced, but are to be given up to that one of the children who may have signed the same. In short, the entire tenor and scope of the third clause shows clearly that the testator had in view not gifts and advancements, previously made as such, but advances only in the nature of loans, and for which he held vouchers, whereby the claims could be enforced. It is claimed, by the plaintiff's counsel, that the mortgage in question was neither a receipt for a loan

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or advance of money, nor an evidence of indebtedness. But that it was, and is, an evidence of indebtedness, seems too clear for argument. It purports, on its face, to be given "in consideration of the sum of twenty-one hundred and sixty-six dollars, to them duly paid." And, in the condition, it is recited, that "this grant is intended as a security for the payment of \$2166, payable in one year from the date hereof, with interest, which payments, if duly made, will render this conveyance void." It was, of itself, evidence upon the trial, not only of the indebtedness, but, also, of the default in payment. It was, therefore, the identical thing described in the clause of the will in question—an evidence of indebtedness for "advances." It is assumed, on the part of the plaintiff, that it was, and had been, the intention of the testator to advance all his children equally, but nothing of that kind appears in any part of the will. It is only by going entirely outside the will, that any thing is made to appear indicating such an intention in the mind of the testator at any time. The will is plain, upon its face, that the testator designed and intended to give to each child all advances he had made, by which an indebtedness had been created, and for which evidences of such indebtedness might be found among his papers. If there is any ambiguity about it, such ambiguity is created by the extraneous evidence which was introduced before the referee. It follows that the mortgage in question cannot be enforced. There was no evidence or suggestion, before the referee, that the avails of the mortgage were needed to pay debts.

The plaintiff was allowed to give, in evidence, the declarations of the testator, for the purpose of proving that the indebtedness secured by the mortgage was a loan, and not an advancement, to the defendants, or one of them. To this evidence the defendants objected in due time, and excepted to the ruling admitting it. This ruling was clearly erroneous. The conversations and declarations of



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the testator, in favor of the executor, in actions between him and third persons, are never allowable, unless under some peculiar circumstances, forming an exception to the general rule. The evidence here offered was not within any exception. It was upon the main issue in the case, and clearly was incompetent evidence for the plaintiff. For this error, alone, the judgment should be reversed.

Whether upon this issue, as to whether the money was in fact furnished the defendants, by way of advancement or otherwise, the defendants are entitled to use the admissions and declarations of the testator, in their behalf, against the plaintiff, should, perhaps, be considered here, in view of the new trial before the same or another referee. The question does not, necessarily, arise on this appeal, although it was raised on the trial, by the plaintiff.

It seems clear that, had the action been brought by the testator in his lifetime, his parol admissions, or declarations, that the money had been furnished by way of advancement, and not as a loan, would have been inadmissible, on the ground that they would contradict the plain terms and legal intendment of the mortgage. If such admissions could not have been used as evidence against the testator, had he brought the action in his lifetime, it is difficult to see how they can be properly used in this action, for the same reason. It follows, from these views, that the judgment must be reversed, and a new trial ordered, with costs to abide the event.

[MONROE GENERAL TERM, September 7, 1868. *E. D. Smith, Johnson and J. C. Smith, Justices.*]

CHAUNCEY VIBBARD and others *vs.* CHARLES RODERICK,  
impleaded, &c.

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Where, in an action upon a promissory note signed in the name of a firm, it is proved that the body and signature are both in the defendant's handwriting, and there is nothing in the signature to indicate that the defendant signed the note as the agent of any other person, the presumption arises that he was one of the makers.

In such an action, an amendment of the complaint by inserting therein a count for goods sold and delivered, which formed the consideration of the note, was allowed, on the trial. *Held*, that as the amendment was in furtherance of justice, and did not change, substantially, the claim of the plaintiff, which was an existing indebtedness for property sold and delivered, and it only operated to conform the pleading to a state of facts which the evidence had already disclosed might possibly exist, it was clearly authorized. E. D. SMITH, J. dissented.

*Held*, also, that the court having the power to grant the amendment, the terms upon which it should be allowed were wholly discretionary, and were not subject to review upon exception.

Where an individual, though not in fact a member of a firm, has held himself out to the plaintiffs and to the public as a partner, so that the plaintiffs had reason to believe, and did believe he was a member, and on the faith of his representations trusted the firm, he will be estopped from denying that he was a partner, and liable upon that ground.

It is not necessary that he should have declared, in express terms, that he was such partner; if he held himself out to be such, in other ways calculated and intended to induce the belief of prudent business men, that is enough.

**A**PPEAL by the defendant Charles Roderick, from a judgment entered on the verdict of a jury.

The action was brought against Charles Roderick and Samuel J. Roderick, upon a promissory note in the words and figures following:

"\$240.65.

Rochester, 3d Nov. 1865.

One month after date, we promise to pay to the order of Vibbard, Fiske & Co. two hundred and forty  $\frac{65}{100}$  dollars at the Flour City National Bank in Rochester, value received.

RODERICK & Co."

The complaint alleged that the defendants were co-partners, under the firm of Roderick & Co.; and that they made the note in the firm name, and delivered the same

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to the plaintiffs. The defendant Charles Roderick, appeared and put in an answer denying generally all the allegations of the complaint. Samuel J. Roderick did not appear.

On the trial at the circuit, a witness was sworn on behalf of the plaintiffs, and testified to his making computation of interest on the note, and that the principal and interest to that date was \$264.32.

The defendant admitted that the plaintiffs were the payees named in the said promissory note. The plaintiffs here rested their case. The defendant thereupon moved that the plaintiffs be nonsuited, upon the following grounds, viz :

1st. That there was no allegation in the plaintiffs' complaint, that the plaintiffs were co-partners, and no evidence given upon that subject.

2d. That there was no evidence showing that the defendant Charles Roderick was a member of the firm of Roderick & Co. or had any interest in that firm.

The court denied the motion, to which decision the defendant's counsel excepted.

The plaintiffs asked leave to amend their complaint so as to claim upon the original consideration of the notes, and to recover for goods sold and delivered. The defendants' counsel objected to the plaintiffs' right to amend, upon the ground that the amendment asked for was a new cause of action which the defendant was not prepared to try; which objection was overruled by the court, and the plaintiffs' complaint was so amended; to which ruling and decision of the court the defendant's counsel excepted.

At the close of the defendant's testimony, the plaintiffs introduced further testimony, as to the existence of a partnership between the defendants, and again rested, and the testimony closed. The plaintiffs' counsel thereupon asked the court to direct the jury to find a verdict in favor of the plaintiffs, and insisted that there was no

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Vibbard *v.* Roderick.

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question of fact to be submitted to the jury, which the court refused.

The defendant's counsel then renewed their motion for a nonsuit, upon the grounds that there was no evidence in the case to show that the defendant was a partner in fact in the firm of Roderick & Co. but all the proof showed he was not such partner. That there was no evidence in the case to show that he ever held himself out as a partner, or did any act, or made any representation which would render him liable as a partner to persons dealing with the firm. That there was no evidence that he ever did any act, or made any representation to the plaintiffs at the time of the purchase of the goods, or before, that would render him liable as a partner to them. That there was no evidence that the defendant Charles Roderick represented or held himself out to the plaintiffs as a partner in the firm of Roderick & Co. Nor was there any evidence that the plaintiffs were so informed, or informed of any such representation before the credit was given to the firm, or that they gave the credit upon the faith of such being the case.

The court denied the motion, and decided the case must be submitted to the jury; to which decision the defendants' counsel excepted. The court charged the jury as follows, viz:

"The plaintiffs claim to recover upon two causes of action.

- 1st. The original amount for the bill of goods sold, and
- 2d. Upon the note which was given some months after the goods were delivered.

The note you observe was signed in the firm name of Roderick & Co. and the evidence is also that the goods were sold and delivered to Roderick & Co. and the question is whether the defendant is liable as a member of that firm. It is insisted on the part of the defendant, that he was not a member of that firm, and that this con-

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tract was not made under circumstances which make him liable as a member of the firm. If you are satisfied that he was not, then the plaintiffs are not entitled to recover upon that ground; but you will be obliged to pass upon the further question: That if the defendant, although not in fact a member of the firm and transacting business in the name of the firm, held himself up to the public as a partner, or represented himself as such, so that the plaintiffs and others dealing with him in the name of the firm had reason to believe, and did believe, that he was a member of it, and on the faith of such representations trusted the firm in selling them goods on credit, or taking their notes, then the plaintiffs would be entitled to recover. In order to determine this question, you will look carefully into the testimony in respect to his dealing with the plaintiffs. The first transaction appears to have been in August, 1865, and the only testimony on that subject is Roderick's. He stated that he went there, at the request of some gentlemen, who gave him their card.

A negotiation was commenced, and he states that in the course of that negotiation nothing whatever was said as to who composed the firm, or as to whether he was acting for himself, or as the agent of others. Then the question arises, which you are to determine under those circumstances, had the plaintiffs a right to suppose when he gave them the name of Roderick & Co. as the firm for whom he was buying, and to whom those goods were to be shipped, that he was a member of that firm, and that he was acting for himself in this matter. The defendant's counsel is right in saying that in order to make the defendant liable, the case must be such as to constitute what is called in law an estoppel. That the defendant must be estopped from asserting that he was not in fact a member of the firm. In other words that he must have represented that he was a member of the

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firm in some way. [It is not necessary in order to establish a cause of action on this ground, that the plaintiffs should give evidence so strong as to show that there was an express admission or declaration on the part of the defendant, but the question is, whether his talk was such as to actually induce the plaintiffs, in the exercise of proper care, to suppose, and whether they did in fact suppose, he was a member of the firm, and trusted the firm on the faith of such being the fact.] (To this last paragraph the defendant excepted.) If you are satisfied that the plaintiffs are entitled to recover upon either of these grounds, your verdict will be \$264.32. If you are not satisfied by the evidence that the plaintiffs are entitled to recover upon either of those grounds, your verdict will be for the defendant."

The defendant's counsel then requested the court to charge:

"That if the jury believes that Charles Roderick was not in fact a member of the firm of Roderick & Co. at the time the goods were sold, that then his silence as to who were or were not members, or as to who composed that firm, no questions being asked by the plaintiffs, would not render him liable."

The court refused to charge, on this point other than he had already charged. Whereupon the defendant's counsel excepted. The defendant's counsel also requested the court to charge: That the mere fact that the signature to the note in suit was in the handwriting of the defendant, was no evidence that the defendant was a member of the firm of Roderick & Co. The court declined so to charge, but did charge as follows: "Upon that precise point I charge that it does not raise a legal presumption, but it is evidence to go to the jury." To all which the defendants' counsel excepted. The jury found a verdict in favor of the plaintiffs for \$264.34.

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*J. H. McDonald*, for the appellant. I. The defendant's motion for a nonsuit should have been granted. The only proof given by the plaintiffs, connecting this defendant with the note was, that the note and signature was in his handwriting. This did not prove, or tend to prove, him a member of the firm of Roderick & Co. The book-keeper or head clerk usually draws and signs the firm name to notes given by the firm; and the fact that they are in his handwriting does not tend to prove him a member of the firm. This evidence would not have warranted the jury in finding a verdict for the plaintiffs, and the court should have nonsuited the plaintiffs. (*Stuart v. Simpson*, 1 Wend. 376. *Demyer v. Souzer*, 6 id. 436. *Wilson v. Williams*, 14 id. 146. *Labar v. Coplin*, 4 Comst. 547. *McMartin v. Taylor*, 2 Barb. 356. *Carpenter v. Smith*, 10 id. 663. *Ernst v. Hudson River R. R. Co.*, 24 How. 97.) This evidence was not supplied afterwards in the course of the trial. A partnership in fact was not afterwards proven, but on the contrary it was proved that none ever existed, and the plaintiffs abandoned the attempt to recover upon the note, and proceeded upon the theory that no partnership in fact existed, and sought to recover for goods sold and delivered.

II. The court allowed the plaintiffs to amend their complaint by inserting a new cause of action; or, in other words, by entirely changing the cause of action, and this without the imposition of any terms whatever. To this the defendant objected, upon the ground "that the amendment asked for was a new cause of action, which the defendant was not prepared to try. The objection was overruled. In this, it is submitted, the learned judge erred. It deprived the defendant of rights to which he was legally entitled. He had a right to require the amended complaint to be served upon him. He had a right to answer or demur to it. He had a right to have twenty days for that purpose. The plaintiffs should have been

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required to reimburse him what he had lost by reason of and prior to the amendment. At least the defendant should have been compensated by the payment of a trial fee and the disbursements which he had incurred. This would have been only justice, and is the well settled rule on allowing amendments, both before and since the Code. (*Union Bank v. Mott*, 19 *How. Pr.* 267. 11 *Abb. Pr.* 42, and cases cited at the end of opinion.) By this amendment, the whole cause of action was changed; from being an action upon a promissory note, it became an action for goods sold and delivered. The first was virtually stricken from the record, and the last only remained. This is not a case which might arise under section 169 of the Code; where there is simply a mistake in the pleading; such as inserting a wrong date or an incorrect name or amount. On the contrary, in this case the amendment allowed, changed the whole scope and character of the claim, and made it to all intents and purposes a new and independent action requiring an entire new line of defense. Hence it was erroneous for the court to allow such an amendment without proper terms; such as would be just towards the defendant. (*See same cases.*) Upon a complaint being amended in a material particular the defendant's right to answer the amended complaint by interposing any defenses which he may possess is absolute and unrestricted. (*Harriott v. Wells*, 9 *Bosw.* 631.) Neither at common law, nor under the statutes, did the courts ever claim to allow an amendment to an existing pleading by the insertion of a new and different cause of action or defense. (*Sackett v. Thompson*, 2 *John.* 206. *Heneshoff v. Miller*, *Id.* 295. *Trinder v. Durant*, 5 *Wend.* 72. *Williams v. Cooper*, 1 *Hill*, 637, and see *Woodruff v. Dickie*, 31 *How. Pr.* 164.) An amendment is the correction of some error or mistake in the pleading already before the court, and there must therefore be something to amend; whereas the insertion of facts constituting a new cause of action



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would be a substituted pleading, and not an amendment of an existing pleading. (*Woodruff v. Dickie, supra.*) In the case at bar it was not a variance between the pleadings and the proof; but was a cause where the allegations of the complaint and the cause of action therein stated were unproved in their entire scope and meaning; an amendment in such a case has never been allowed. There is nothing to amend. A new cause of action may be substituted instead of the old one; but this is not an amendment. It is an absolute and entire change of the existing record.

III. When the evidence closed on both sides, the defendant renewed his motion for a nonsuit. It is confidently submitted that such motion should have been granted, because: (1.) He never was a member of the firm of Roderick & Co.; and (2.) He was not estopped from denying the fact. The evidence on the first point consists principally of that of Charles Roderick and Mr. Terry. The former positively swears that he never was a member of the firm; never had any interest in it, except as its agent or clerk, and that his wife and Caroline Bryan supplied the only money that constituted the capital, and upon which the business was commenced. That the money which the defendant's wife furnished, was her own money, which she acquired by a sale of furniture which she had received some time before from her folks; and that such money was not received through or from the defendant. It was also shown who had composed the firm from its formation down to the giving of the note. This testimony should be and is conclusive of the point that the defendant never was a member of the firm of Roderick & Co. The plaintiffs, however, introduce a witness "Terry" on this point; but his testimony is fully contradicted and explained by the defendant. Terry testifies to a conversation had with the defendant on one occasion, and the defendant gives an entirely different

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version of the same conversation. Terry, it will be observed, did not put the direct question to the defendant as to who were members of the firm; nor did he go there for that purpose, but simply to ascertain its responsibility; and it is very evident he was mistaken as to the language used. Terry says he communicated the information he had received from the defendant to the plaintiffs by letter on the same day. Why not introduce this letter in order to corroborate his testimony. When the note was given, the agent of the plaintiffs inquired who were the members of the firm; and he was told Mary Roderick and Samuel J. Roderick, and then took their note in their firm name. The plaintiffs also introduce a letter purporting to have been written by the defendant to the plaintiffs. It is submitted that this letter does not in any respect help the plaintiff's case. The defendant had been the corresponding clerk of the firm, and it refers to the note of the firm; the same that was given to the agent of the plaintiffs, when he was told that the firm was composed of Mary Roderick and Samuel J. Roderick, and it was perfectly natural for the defendant to write as he did; and especially when the firm had at the time been dissolved. He does not connect himself in the letter either with the firm or with the note, and it cannot have the slightest weight when compared and brought in contact with his unqualified denial of ever having any connection with either; and the plaintiffs knew this fact when the note was delivered to them. This knowledge on the part of the plaintiffs, is entirely uncontradicted. It is therefore impossible that the plaintiffs can recover on the ground that the defendant was in fact a member of the firm.

IV. The only remaining ground then to notice is, "Did the defendant hold himself out to the plaintiffs as a member of the firm of Roderick & Co., when the goods were purchased, and did the plaintiffs give the firm the credit on the faith of his representations, and on the ground

that he was such member, and is the defendant therefore estopped from denying that he was such member. To entitle the plaintiffs to recover upon this ground, they must show affirmatively all these facts. (*Irvin et al. v. Conklin et al.* 36 Barb. 64. *Lawrence v. Brown*, 1 Selden, 394.) The principles of estoppel are well settled. An estoppel *in pais* will exist against a party where it appears: (1st.) That he has made an admission which is clearly inconsistent with the evidence he proposes to give, or the title or claim he proposes to set up. (2d.) That the other party acted upon the admission; and (3d.) That he will be injured by allowing the truth of the admission to be disproved. (8 Wend. 483. 3 Hill, 215. 4 Barb. 495. 7 id. 407. 8 id. 102. 18 N. Y. Rep. 392. 30 id. 519.)

The first, which is the most important must be made at or before the time the credit was given, and the creditor must, upon the faith and strength of the admission, have given the credit. An admission after the act does not create an estoppel by relation. (*Pike v. Acker*, Hill & Denio Supp. 90.) It was error for the court to charge the jury "that it was not necessary, in order to establish a cause of action on the ground of estoppel, that the plaintiffs should give evidence so strong as to show that there was an express admission or declaration on the part of the defendant. But the question is, whether his talk was such as to actually induce the plaintiffs, in the exercise of proper care, to suppose, and whether they did in fact suppose, he was a member of the firm, and trusted the firm upon the faith of such being the fact." This point should not have been submitted to the jury at all. The evidence in relation thereto consisted solely of that of the defendant, and was entirely undisputed. The plaintiffs must show affirmatively that the defendant expressly admitted to them, at or before the time the goods were purchased, that he was such member; or that he had so admitted to

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others, and that the fact came to their knowledge, and that they were induced to, and did give the credit by reason of and upon the faith of such being the fact. The plaintiffs, nor either of them, has testified in the cause. There is no testimony showing why or upon what ground the credit was given. There is not one word of evidence showing what occurred at the time of the sale of the goods, except that of the defendant himself, and upon his testimony standing alone and uncontradicted as it is, it was erroneous to thus charge the jury.

The case should not have been submitted to the jury. There was no disputed question of fact upon any point or ground upon which the plaintiffs would be entitled to recover, and hence the court should have either nonsuited the plaintiffs or directed a verdict in favor of the defendant.

The court erred in refusing to charge the jury as follows: "That the mere fact that the signature to the note in suit was in the handwriting of the defendant, was no evidence that the defendant was a member of the firm of Roderick & Co.;" and in charging upon that point as follows: "Upon that precise point I charge that it does not raise a legal presumption, but it is evidence to go to the jury." Testimony that fails to raise a legal presumption is hardly competent to be submitted to a jury.

*Edward Harris*, for the respondents. I. The nonsuit was properly denied, because: 1st. It was admitted that the plaintiffs were the payees named in the promissory note. 2d. Charles Roderick having signed the note himself without any thing to indicate that he did so as an agent, raised a presumption of fact that he was one of the makers.

II. The court had power to allow the amendment to the complaint. (*Code*, §§ 169, 170, 173.) There is no difference between the power of the court to grant amendments on the trial, and its power to do so on motion at special

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term. (*Woodruff v. Dickie*, 31 *How.* 164.) And there is no limit to the power of the court to grant amendments before trial. (11 *How.* 170.)

III. The exceptions to the charge and refusal to charge were not well taken, because it appears from the evidence that the defendant, Charles Roderick, so conducted himself as to authorize the plaintiffs to believe him a partner in the firm of "Roderick & Co." The jury have found that he did so, and in such case he is liable. (*Pars. on Part. ch. 6, pp. 61, 115, 123.*)

JOHNSON, J. The nonsuit, when the plaintiffs rested their case, was properly denied. The defendant had then admitted that the plaintiffs were the payees named in the note, and it had been proved that the body and signature of the note were both in the defendant's handwriting. There was nothing attached to the signature to indicate that the defendant had signed the note as the agent of any other person, and the presumption arose that it was his note.

The amendment to the complaint allowed upon the trial was the insertion therein of a count for goods sold and delivered, which formed the consideration of the note, as the evidence had then disclosed. The defendant's counsel objected that the plaintiffs had no right to amend, on the ground that the amendment asked for was a new cause of action, which the defendant was not prepared to try. The amendment was then allowed, and made, and the defendant's counsel excepted. There was no error in this. The court had the right to allow the amendment, according to all the cases, and the express provisions of section 73 of the Code. The amendment was clearly in furtherance of justice, and did not change, substantially, the claim of the plaintiffs. The substantial claim of the plaintiffs was the indebtedness arising from the sale of the goods, which was supposed by them to have been

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liquidated to that extent, by the making and delivery of the note, which was the cause of action stated in the complaint. Upon the trial the authority of the person who drew and signed and delivered the note, to make it and bind the defendants thereby was disputed. If the note did not operate as a liquidation of the account for the goods purchased, and a payment, *sub modo*, then the indebtedness existed in the form of the account, which was permitted to be inserted in a new count, to prevent a failure of justice in the action. As the amendment did not change the plaintiffs' claim, substantially, which was an existing indebtedness for property sold and delivered, and only operated to conform the pleading to a state of facts which the evidence had already disclosed might possibly exist, the amendment was clearly authorized, and no case can be found to the contrary. (*New York Ice Company v. Northwestern Ins. Co.*, 23 *N. Y. Rep.* 357. *Russell v. Conn.*, 20 *id.* 81. *The Bank of Havana v. Magee*, *Id.* 355. *Lounsbury v. Purdy*, 18 *id.* 515. *Harrington v. Slade*, 22 *Barb.* 161. *Dunnigan v. Cummev*, 44 *id.* 528. *Troy and Boston R. R. Co. v. Tibbitts*, 11 *How. Pr.* 168. *The Cayuga County Bank v. Warden*, 6 *N. Y. Rep.* 19.) The court having the power to grant the amendment, the terms upon which it should be allowed were wholly discretionary, and are not subject to review upon exception. (*Van Ness v. Bush*, 22 *How. Pr.* 481.) But if this were otherwise, it was clearly a case where it was proper to allow the amendment without terms and allow the trial to proceed. It must have been apparent that the defendants were as well prepared to defend the claim of indebtedness upon the account as upon the note. If they were not, they could have shown it. But they did not show any thing on the subject, nor offer to do so; and there is no reasonable ground to complain that the discretion of the court was not fairly and discreetly exercised.

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There is a class of amendments which, it has been held, the court has no right to make or allow, upon a trial or afterwards, by way of conforming the pleadings to the facts proved. That is where the amendment changes "substantially the claim or defense," as where the amendment would change the claim from tort to assumpsit, or from an action of assumpsit to an action to reform a written agreement. (*Walter v. Bennett*, 16 N. Y. Rep. 250. *Bush v. Tilley*, 49 Barb. 599. *Whitcomb v. Hungerford*, 42 id. 177.) But those cases do not apply here. All the change here, was such only as was necessary to enable the plaintiffs to recover the same debt, whether it existed in the form of a note, or an account. It was no substantial change of the claim.

When the evidence on both sides was closed there was clearly enough in support of the complaint to submit to the jury on the question whether the defendant was not in fact a partner and member of the firm; and if not whether he had not held himself out to be such, in such a manner as to estop him from denying that he was such partner and member. His declarations, letters and acts in giving and making notes for the settlement of claims against the firm were sufficient to prevent the case from being taken from the jury.

There was no error in the charge. If the defendant was a member of the firm he was of course liable. But if he was not, but had held himself out to the plaintiffs and to the public as a partner, so that the plaintiffs dealing with the firm had reason to believe and did believe he was a member, and on the faith of his representations trusted the firm, he would be estopped from denying that he was a partner and liable upon that ground. This is what the learned judge charged. It was not necessary that the defendant should have declared in express terms that he was such partner; if he held himself out to be

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such in other ways calculated and intended to induce the belief of prudent business men, that is enough.

There was no error in the refusals to charge as requested.

The judgment must therefore be affirmed.

J. C. SMITH, J. concurred.

E. DARWIN SMITH, J. (dissenting.) As there was a special term running with the circuit, I have no doubt the circuit judge might in his discretion entertain the application as in special term to amend the complaint, at the circuit, and that the order for that purpose, amending said complaint, cannot be reviewed and is not the basis of an exception. But the amendment was clearly not such as could have been made in the circuit or by a referee, if the case had been on trial before a referee. (*Union Bank v. Mott*, 19 How. 267. *Ford v. Ford*, 35 id. 321.) On a trial at the circuit the court tries the issues made in the pleadings as the circuit judge formerly did upon the circuit or nisi prius roll. It may disregard a variance between the allegations in a pleading and the proof, in the same manner as a referee may do, and not otherwise; or it may amend the pleading at the time, to obviate such variance. But this case was not one of such variance. There was no variance between the pleadings and proof. The amendment allowed inserted an entire new cause of action upon the record which could only be allowed by the court at special term. The amendment, if it had been actually put in form at the time, would have placed upon the record a second count. The complaint originally contained one count upon a promissory note, against Charles Roderick and Samuel J. Roderick, as partners. Charles alone defended, and denied the complaint, and Samuel suffered default. Upon this count the plaintiff, if he recovered in the action, was bound to recover on the note as the joint note of the defendants, and could take no other judgment.



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The amendment, when made, would have introduced upon the record an *indebitatus* or *quantum valebat* count for goods sold and delivered. The complaint in that shape would consist of a count upon the note sued or count for goods sold and delivered. The note was for \$240.62, and was given for part of a bill of goods amounting to \$690.62. The new count must be for a bill of goods amounting to \$690.62. The complaint in that shape had never been served upon either of the defendants. Judgment might pass against Samuel for the amount of the note, because he had suffered default, but not on the second count for the amount of the goods sold and delivered. The defendant Charles Roderick, in answering the complaint, had simply denied the making of the note, but he had never had an opportunity to answer or deny the amended complaint consisting of two counts. He had an absolute right to have the amended complaint served upon him and have time given to answer or demur to it. Of this right the court had no power to deprive him. (*Union Bank v. Mott*, 19 *How.* 267.) He had committed no default, and the court could not impose terms upon him, or deny his right to answer the amended pleading and to take twenty days' time in which to do so after service of such amended pleading. After the amendment was made at the circuit the cause was not in a condition to proceed with the trial. There was no issue. There was no answer on the record to the amended complaint, and certainly none to the new count. The defendant might doubtless have waived this objection and have consented to let his answer stand as an answer to the amended complaint and to proceed immediately to trial; but he did no such thing. He objected to the amendment, and insisted that he was not ready to try the new issue. It seems to me the case was clearly one of a mistrial. The court, in my opinion, has no power at the circuit to amend a complaint by inserting a new count in it and proceed to trial

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upon the original answer, without express consent on the part of the defendant. Causes must be tried upon distinct issues taken in formal pleadings, and these pleadings cannot be made *ore tenus* at the circuit, except with and by the clear, explicit consent of both parties aside from clear cases of variance. I think, for these reasons, there should be a new trial, with costs to abide the event.

Judgment affirmed.

[MONROE GENERAL TERM, September 7, 1868. *E. D. Smith, Johnson and J. C. Smith, Justices.*]

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FERRIS F. HYATT *vs.* NOAH D. TAYLOR and JOHN TAYLOR.

Under a statute providing that whenever the proprietor of any hotel, inn, &c. shall provide a safe, for the safe keeping of any money, jewels, &c. belonging to guests, and post a notice thereof in the rooms, and a guest shall neglect to deposit his money, &c. in such safe, the proprietor of the hotel shall not be liable for any loss of such money, &c. sustained by such guest, by theft or otherwise, if after the proprietor of a hotel has furnished a safe and given the required notice thereof, a guest neglects to place his money, &c. in the safe, but keeps them in his own care, such proprietor is not responsible for their loss, to any amount, or for any value; not even for a sufficient amount of money for the guest's ordinary traveling expenses.

IN June, 1865, the plaintiff, in traveling, staid all night at the hotel kept by the defendants in Jersey city in the state of New Jersey. The plaintiff alleged and claimed on the trial that he was a guest in the defendants' house, the night he staid there, and lost nearly \$200 in money, while sleeping in the room assigned him. Some other things were lost at the same time, and were considered on the trial, but as they do not affect the question, the facts respecting them are omitted. The defendants, on the trial, insisted that the plaintiff was not a guest at their house, and did not lose his money there; and if he did,

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they were not liable, for the reason that they had a safe in the office of the house for the purpose of depositing the money of guests, and had given the proper notice to the plaintiff, according to the laws of New Jersey, and the plaintiff had not placed his money in the safe, but had chosen to keep it by him in the room, and if lost they were not responsible for it.

As to the plaintiff's being a guest at the defendant's house, and losing his money there, the questions were properly submitted to the jury, passed upon by them, and found in favor of the plaintiff.

As to the defendant's being protected by the act of New Jersey, his honor Justice BALCOM under the force of authority charged that they were not protected as to money sufficient for necessary traveling expenses of the plaintiff. To which the defendants' counsel excepted, and under the charge the jury rendered a verdict for the plaintiff for \$190.

*James W. Culver*, for the plaintiff.

*George Sidney Camp*, for the defendants.

*By the Court*, MURRAY, J. The only point upon the merits arises as to the liability of the defendants under the statute of New Jersey approved April 6th, 1865, which is as follows:

"State of New Jersey: An act for the better protection of hotel, inn and boarding house keepers.

Section 3. And be it enacted that whenever the proprietor or proprietors of any hotel, inn or boarding house shall provide a safe in the office of such hotel, inn or boarding house, or other convenient place, for the safe keeping of any money, jewels or ornaments belonging to the guests or boarders thereof, and post a notice stating that such safe is provided, in which such money, jewels or ornaments may be deposited, in the room or rooms occupied by such

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guest or boarder in a conspicuous manner; if such guest or boarder shall neglect to deposit such money, jewels or ornaments in such safe, the proprietor or proprietors of such hotel, inn or boarding house, shall not be liable for any loss of such money, jewels or ornaments sustained by such guests or boarders by theft or otherwise."

The defendants having furnished the safe and given the required notice, and the plaintiff having neglected to place his money in the safe, but kept it with him in the room assigned to him, there being no more, when stolen, than was necessary for his ordinary travelling expenses, are they liable?

In construing statutes, courts are required to judge of the intention of the legislature from the plain and obvious import of the language used in the act, reading the whole act together. (*Smith's Com.* p. 763, §§ 649, 650. *Id.* p. 830, § 714, and following. *The People v. Utica Ins. Co.*, 15 *John.* 357-394. *Stone v. The Mayor of New York*, 25 *Wend.* 157, 177, and following. *James v. Patten*, 2 *Seld.* 10. *Post v. President. Utica Bank*, 7 *Hill*, 407, 408. *Waller v. Harris*, 20 *Wend.* 561, 562. *McClaskey v. Cromwell*, 1 *Kern.* 601. *People v. Cowles*, 3 *id.* 360.)

The language of the act is, "Whenever the proprietor, &c. shall provide a safe, &c. for the safe keeping of any money, &c. and shall give notice, &c. and such guest or boarder shall neglect to deposit such money, &c. in such safe, the proprietor, &c. shall not be liable for any loss of such money, &c. sustained by such guest or boarder." Language could hardly express more clearly than is done in this statute the intention of the legislature to relieve hotel and boarding house keepers from their common law liability as to all money, &c. in the possession of the guest, in case the guest neglects to deposit the same in the safe provided for the purpose, on being duly notified.

There is no exception in the act of any portion of the guest's money. Not a word that indicates an intention to

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except money necessary for traveling expenses. On the contrary, every word used in the act denotes an intention to relieve them from liability, as to all money, jewels and ornaments in the possession of the guests. The language is so plain that I think the language used by Senator Verplanck in delivering his opinion in the case of *Stone v. The Mayor of New York*, (25 *Wend.* 180,) may not be inappropriate. He says: "When a statute rests upon legislative discretion or judgment upon public policy, then any assumption by courts of varying, abridging or extending the clear provisions of a statute upon the ground of carrying out the policy or intention of the enacting body, appears to me to be an usurpation of power, transgressing the fixed boundaries between the judicial and legislative authority."

This act rests upon legislative discretion, and its judgment of public policy. It is only in case of doubt or ambiguity that courts are allowed to go beyond the import of the language in search of legislative intent. (*James v. Patten*, 2 *Seld.* 9-13. *Stone v. Mayor of New York*, 25 *Wend.* 179. And in this discussion I am not unmindful of the fact that this act is in derogation of the common law, and must be strictly construed. But I will go farther, and examine the cause and necessity for this enactment, and judge from them what probably was the intention of the legislature in the passage thereof.

At common law, if the plaintiff was a guest at the hotel of the defendants, and lost or had his money stolen from him while in his room, the defendants were liable. They stood in the light of insurers of the property of their guests, unless they could show that the negligence of the guest contributed to the loss. The frequent loss of money—more frequently in small quantities—and watches by guests at hotels, and the ease with which the guest could establish his claim against the hotel keeper; the difficulty for the hotel keeper to disprove such a claim, placing him

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almost entirely in the power of the guests; and the extraordinary character of the common law liability of the hotel keeper, all combined to demand the passage of this act by which the property of the guest could be preserved from loss, and hotel and boarding house keepers protected from liability, and the guest made responsible for his own neglect to place the property in a secure place. Few travelers carry large amounts of money. The great mass of them carry no more than is necessary for traveling expenses. Except from the operation of the act, means necessary for traveling expenses, and you afford little protection thereby to the hotel keeper.

The act in question includes boarding-house keepers, as well as hotel keepers. Travelers do not usually stop at boarding houses. They are usually adapted to, and occupied as abodes for individuals for a longer period of time than travelers usually stop. The exception claimed for the benefit of travelers would not be necessary as to boarders. There is no distinction made, in the act, between the two. This tends strongly to show that the legislature never intended an exception to be made as to any money.

The act is entitled "An act for the better protection of hotel, inn and boarding house keepers. By this the intention of the legislature is clearly indicated. The framers had in view the better protection of hotel keepers. They expressed an intention to frame a law that would relieve them from the common law liability as to the property named therein. Having that in view, did they intend or contemplate that a construction should be given to their act more strongly against the object of their favor than the plain and obvious import of the language used by them? With this object in view they doubtless intended to give them protection to the extent of the language used. If they had intended an exception to have been made against them they themselves would have placed it there.

By this act no hardship is imposed upon the guest. If

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he has money of such amount, or jewelry, or ornaments of such value, that he is unwilling to keep them in his own care, and be responsible for their loss, he can entirely relieve himself from such care and responsibility by having them placed in the safe provided. If he deems his money of too small an amount, and his jewelry and ornaments of too little value, to require that precaution; or if he is of opinion that his room is so securely fastened; or if he is in a place not frequented by thieves, or in a house where all persons about it are known to him to be above suspicion, so that precaution is needless to guard against loss, he can keep his money, jewelry and ornaments with him, at his own risk. The act places the matter entirely in his own hands. He acts according to his own judgment, and assumes the responsibility or not, as he chooses. Let the amount or value be greater or less, he judges of the propriety of using the required precaution. The manifest justice and propriety of such an act also tends strongly to show the legislative intent.

I am thus forced to the conclusion that the defendants, having furnished the safe and given the required notice, and the plaintiff having kept his money and things in his own care, and neglected to place them in the safe, are not responsible for their loss to any amount, or for any value.

I am reluctantly forced to this conclusion, out of deference to the opinion of the general term of the Supreme Court in the first district, written by his honor Justice SUTHERLAND, in the case of *Gile v. Libby & Whitney*, (36 Barb. 70,) giving the construction contended for by the plaintiff in this action, to a statute of this state substantially similar to the act of New Jersey in question. But I cannot, in accordance with my convictions of what is the true and only legitimate construction to be given to the act in question, adopt its reasoning or conclusion.

The point has not been made, and this court is not called upon to decide, what effect it would have upon

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the defendants' liability, in case it was submitted to the jury and they found that the defendants were guilty of gross negligence in placing the plaintiff in a room totally unsafe and unfit to be occupied by guests.

The verdict should be set aside, and a new trial granted, costs to abide the event.

[BROOME GENERAL TERM, May 12, 1868. *Balcom, P. J. and Boardman, Parker and Murray* Justices.]

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### WEAVER and others vs. WISNER and others.

The plaintiffs, on the 8d of January, 1867, wrote to the defendants, at M. offering to sell them one hundred barrels of apples, delivered in the railroad cars at Havana depot for \$3.50 per barrel, stating the kind of apples and their condition. The apples were to be shipped immediately, and for the price the plaintiffs were to draw on the defendants at sight. The defendants replied by letter, that if the apples were of good size, fair and sound, the plaintiffs might ship them at once. On the 10th of January, the plaintiffs shipped one hundred barrels of apples on the cars, directed to the defendants at M.; the defendants not being present at the time of shipment, to receive the apples, nor seeing them until they arrived at M. They were received by the defendants, at M. on the 12th of January. On opening and assorting them, eighty-two barrels were found to be merchantable, and eighteen barrels rotten and worthless. On the 15th of January, before the assorting was completed, the defendants sent the plaintiffs a check for a part of the price. After they had completed the assorting, they sent the plaintiffs a check for the balance of the price of the eighty-two barrels of sound apples, and refused to pay for the eighteen barrels found to be unsound. The plaintiffs returned the checks, and brought an action to recover the price of the whole consignment.

- Held* 1. That the defendants not having been present to receive or accept the apples when delivered on the cars, and they not having paid for, received or accepted them until they arrived at M. it was a case, not of sale and delivery with warranty, but an executory contract to sell and deliver one hundred barrels of good and merchantable apples.
2. That the defendants having received the apples, and not having rescinded the contract, on examination and discovery of the defects, by a return, or an offer to return the property, or giving notice of their refusal to receive the same, and that the apples were subject to the plaintiffs' order, had



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waived the alleged defects; and their right to recoup the damages arising therefrom, did not survive such acceptance.

3. That the defendants did more than this; they affirmed the contract and their acceptance of the apples thereunder, by a tender of payment for the apples which they conceded to be good.
4. That there having been no delivery with a warranty, it was not a case that should have been submitted to the jury on the questions connected with the recoupment; and the court was right in ordering a verdict for the plaintiffs.

THE plaintiffs are apple dealers residing in Havana, Schuyler county, New York. The defendants are dealers residing at Middletown, Orange county, New York. On the 3d day of January, 1867, the plaintiffs wrote to the defendants that they would sell them one hundred barrels of apples delivered in the railroad cars at Havana depot, for \$3.50 per barrel, stating the kind of apples, when and where put up, and where they had been kept, and that they had opened twelve barrels and found that they had kept well, and looked fresh and good. The defendants were to pay the freight and run all risks on the cars. The plaintiffs requested the defendants to write immediately if they wanted the apples. If they did, the plaintiffs would send them immediately, and draw on them, (the defendants,) for the pay, at sight. On the 5th day of January, 1867, the defendants replied by letter, that if the apples were of good size, fair and sound, the plaintiffs might ship them at once, if the weather was mild, if not, to ship them the first mild day and get them off the same day they were shipped, so there would be no delay.

On the 10th day of January, 1867, pursuant to this order, the plaintiffs shipped on board the cars at Havana depot one hundred barrels of apples, directed to the defendants at Middletown. The defendants were not at Havana to receive them, and did not see them till they arrived at Middletown. On the 12th day of January, 1867, the defendants for the first time received the said

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apples, at Middletown. They removed them from the cars to their store, and there, the same night, examined a portion of them and found them badly rotted. They then assorted the apples, which took them a week or more, and found that eighty-two barrels were merchantable, and eighteen barrels rotten and worthless. On the 15th of January, 1867, the defendants wrote to the plaintiffs about the apples, and sent a check for part of the purchase price. After they had completed assorting, they wrote again to the plaintiffs, and sent a check for the balance of the price of the eighty-two barrels of sound apples, and claimed that eighteen barrels were worthless, and they refused to pay for them. The plaintiffs returned the checks, and brought this action for the purchase price of the whole consignment of apples. The defendant sought to recoup the damages arising from the rotting of the apples. The court ordered judgment for the purchase price of the whole of said apples, and refused to allow the defendants to go to the jury on the questions connected with the recoupment; and held that the contract was executory, and the defendants had waived the defect in the apples by accepting them. The only question presented for consideration in this court is, was the court right in thus ruling and directing a verdict.

*W. J. Groo*, for the defendants.

*M. M. Mead*, for the plaintiffs.

*By the Court*, MURRAY, J. Unless this was a cause that should have been submitted to the jury on the questions connected with the recoupment, the court was right in ordering a verdict for the plaintiffs, for the whole price of the apples.

The defendants not having been present at Havana to receive or accept the apples when delivered on board the

cars, and they not having paid for, received or accepted them until they arrived at Middletown, it is a case, not of sale and delivery with warranty, but an executory contract to sell and deliver to the defendants one hundred barrels of good and merchantable apples. The defendants having received the apples, and not having rescinded the contract on examination and discovery of the defects, by a return, or an offer to return the property, or by giving notice to the plaintiffs that they refused to receive the same in performance of the said contract, and that the apples were subject to their order, have waived the alleged defects; and their right to recoup the damages arising thereupon does not survive such acceptance. The defendants did more. They affirmed the contract and their acceptance of the apples thereunder, by a tender of payment for the apples which they concede to be good. They plant themselves squarely on the position that there was a delivery with a warranty. That position cannot be sustained in this case. (*Reed et al. v. Randall*, 29 N. Y. Rep. 358.) That being so, it was not a case that should have been submitted to the jury on the questions connected with the recoupment, and the court was right in ordering a verdict for the plaintiff.

The motion to set aside the verdict, and for a new trial, should be denied, with costs.

[BROOME GENERAL TERM, November 17, 1868. *Balcom, P. J.* and *Boardman, Parker* and *Murray*, Justices.]

*ELIZA CRUGER vs. EDWARD T. McCLAUGHERY.*

Although a rent charge cannot be apportioned by the act of the parties, it may be by force of the law. The descent of lands from ancestor to heirs is a transfer of title by operation of law. The heirs take and hold such inheritance as tenants in common. Each of such tenants may pursue his remedies independent of the other.

The owner of lands conveyed the same to the defendant's grantor, subject to an annual rent charge thereon, and the right of re-entry in case of non-payment of rent. The grantor died, leaving six heirs. *Held* that one of such heirs could maintain an action of ejectment, to recover possession of her one sixth of the lands, as such heir, for non-payment of rent, without joining the owners of the other five sixths as plaintiffs.

Whether the defendant, in such an action is bound to insist upon the non-joinder of the other owners as parties plaintiffs, by demurrer, or can take the objection by answer, although the defect appears in the complaint? *Quærs.*

THE plaintiff is one of six heirs at law of John Kortright, deceased, who conveyed the lands in question to the defendant's grantor, subject to an annual rent charge thereon, and the right of re-entry in case of non-payment of rent. This action of ejectment is brought by the plaintiff to recover possession of her one-sixth of said lands as such heir, no rent having been paid since 1854. Among other defenses interposed is the non-joinder of the owners of the other five sixths as plaintiffs.

At the close of the plaintiff's case the defendant moved for a nonsuit, on the ground, among others, of such non-joinder, and the court granted such motion, holding that all persons interested in such lands or rents, as or through the heirs of John Kortright, should be joined as plaintiffs, in order to recover.

The exceptions were ordered heard at the general term, and the plaintiff now moves thereon for a new trial.

*Amasa J. Parker*, for the plaintiff.

*Gilbert & Maynard*, for the defendant.

BOARDMAN, J. It is well settled in the law of this state, that the interest reserved by John Kortright is a heredita-

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ment, devisable, descendible and assignable, like other incorporeal hereditaments, and as such is real estate, within the definition of the 1st Revised Statutes, 754, § 27; that the rent is not rent service for want of a reversion in the grantor, but is a rent charge in fee, and equivalent to a rent charge granted by the owner of the land in fee; that the conveyance of John Kortright operates as an assignment and not as a lease, and leaves neither a reversion nor a possibility of reverter; that the covenants of the grantee run with the land; that the interests of both grantor and grantee, in case of intestacy, descend to the heirs, and do not go to the administrators; and that the heir of the grantor may have ejectment under the right of re-entry given in case of non-payment of rent. (*Van Rensselaer v. Read*, 26 *N. Y. Rep.* 558. *Van Rensselaer v. Hays*, 19 *id.* 68. *DePeyster v. Michael*, 6 *id.* 467. *Van Rensselaer v. Slingerland*, 26 *id.* 580.) It has also been decided that when the right of re-entry is not dependent upon a deficiency of sufficient goods and chattels whereon to make distress, no notice of an intention to re-enter need be given, under the act of 1846. The commencement of an action of ejectment stands instead of a demand of the rent in arrear and of a re-entry on the demised premises. (*Hasford v. Ballard*, *MS. Court of Appeals*, *Woodruff, J.*)

It remains for us to consider whether the plaintiff, being the owner by descent of one sixth of the rents charged and of the right of re-entry for their non-payment, can maintain this action, without joining the owners of the five sixths with her as plaintiffs. In other words, are the rents apportioned among the six heirs of John Kortright, deceased, by his death intestate, or must all unite in any remedy for non-payment. If the conveyance in this case had not been in fee, but for years or some limited time, a reversion would have existed in favor of Kortright, and would have descended to his heirs. In that case there is no doubt the rents would have been apportioned among

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his heirs; each would have had a several right of action, and each would have been a landlord as to his interest so severed by the death of Kortright, and the tenancy in common which followed. (*Jones v. Felch*, 3 Bosw. 63. *Gilbert on Rent*, 172. *Crosby v. Loop*, 15 Ill. R. 527, cited in 3 Bosw. *Henniker v. Turner*, 4 Barn. & Cress. 157. *Reed v. Ward*, 22 Penn. R. 144.) Indeed there is no controversy that such is the law in the case supposed. (3 *Kent's Com.* 469, 470. 2 *Wash. on Real Estate*, 18.) But it is claimed by the defense that the same rule does not apply in case of tenants in common of an incorporeal hereditament, of rents charged in fee and no reversion. There is certainly no distinction in the use or effect of the remedy by ejectment in the two cases. In neither case is the lease avoided by the breach of the condition. It is only avoided at the election of the lessor, and unless he so elects, the estate continues in the tenant or grantee. If he elects to avoid it, he acquires in either case by his remedy an absolute title to the property; in one case by the merger of the rent charge, the term and the reversion, and in the other by the merger of the rent charge and the fee. The result is the same in each, but there is a difference in the interests merged to attain it. No distinction, therefore, arises from the nature of the proceeding. Nor is there any thing in the law which makes the interest indivisible in one case and divisible in the other. It is as absurd for one tenant in common of a rent charge with reversion to bring ejectment as for the plaintiff, in this case. By the severance and apportionment of the rent the owner becomes entitled to his several portion of the land. To the extent of his interest the lease is forfeited, and his share is thereafter held in common by him and the lessee according to their several interests. There seems, therefore, no reason why rents should not be apportioned in the one case as well as in the other.

This view seems the more reasonable since our courts

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of appeal recognize no practical distinction between rights of re-entry for non-payment of rent in cases of assignment in fee, and in cases of leases for life or years with reversion. (*Van Rensselaer v. Slingerland*, 26 *N. Y. Rep.* 580. *Same v. Reed*, *Id.* 558. *Same v. Snyder*, 13 *id.* 299. *Same v. Ball*, 19 *id.* 100.) In each case ejectment may be maintained, and the recovery of the property leased or assigned in fee is allowed. In both cases the title to the lands reverts in the lessor or grantor, and as perfectly where no reversion exists as in a case of reversion. Whatever, then, may be the nature of the interest of the plaintiff in this case in the lands, the result of her action gives her the fee as absolutely as though she were a reversioner. It is impossible to distinguish the cases in the nature of the remedy or the efficiency of the relief that will be granted. It is undoubtedly true that a rent charge cannot be apportioned by the act of the parties. But it may be by force of the law. And such is the rule as to any condition in a deed. The descent of lands from ancestor to heirs is a transfer of title by operation of law. The heirs take and hold such inheritance as tenants in common. Each of such tenants may pursue his remedies independent of the others. (2 *R. S.* 341, § 11. 1 *Wash. Real Pr.* 437, 438.) No distinction is made as to the character of the inheritants, whether it be lands, tenements or hereditaments, corporeal or incorporeal.

If, however, tenants in common join in a demise, all must join in the remedy, (*Decker v. Livingston*, 15 *John.* 478;) and so too in case of an injury to the possession. Since, then, their rights as tenants in common under an inheritance are severable, it follows, almost of necessity, that they can sever in pursuing any remedy to enforce their rights.

The case of *Cole v. Patterson*, (25 *Wend.* 456,) is an authority in point to show a severance in law among heirs, tenants in common of a rent charged upon a conveyance

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in fee by the ancestor. It was there held that the rents were apportioned among the heirs, and that one of them might bring ejectment for his proportion upon a re-entry for non-payment of rent. This authority is cited and approved by Hoffman, J. in *Jones v. Felch*, (3 Bosw. 63.) *Jackson v. Topping*, (1 Wend. 388,) is an analogous case of a deed in fee with right of re-entry upon a condition subsequent which was broken. After the death of the grantor, one of his heirs brought ejectment for his share, and recovered. It is true the question involved in this case was not presented by counsel, or decided by the court, but that fact is some, though slight, evidence against the force and effect of the objection. To the same effect is the case of *Bowen v. Bowen*, (18 Conn. Rep. 535. 1 Wash. on Real Prop. 337. 2 id. 16.)

My attention has not been called to a single modern case which sustains the defendants' position. On the contrary the statutes of our state, and the decisions of our courts in analogous cases, indicate that this action was properly brought, and that the judge erred in nonsuiting the plaintiff, for the non-joinder of the other tenants in common, as parties plaintiff.

In view of the foregoing conclusions, it becomes unnecessary to decide whether the defendant was bound to insist upon the non-joinder of the other owners as parties plaintiffs, by demurrer, or can rely upon the same objection by answer, although the defect appears in the complaint.

For the error aforesaid, a new trial should be granted; costs to abide event.

PARKER, J. concurred.

BALCOM, J. concurred; and also thought the objection could only be taken by demurrer.

New trial granted.

[BROOME GENERAL TERM, November 17, 1868. *Balcom, P. J. and Boardman and Parker, Justices.*]



## CLINTON vs. THE HOPE INSURANCE COMPANY.

Where an application and survey is made, by the insured, to accompany a policy of insurance, or is referred to as forming a part of such policy, such application, survey and policy are to be construed together, as parts of one entire contract.

Three separate surveys of property had been made, prior to the issuing of the policy in suit, and were on file in the office of the company's agent; the earliest bearing date in 1860, and the latest in 1863. All of these were signed by persons other than those insured under the policy in suit. All were made under circumstances wholly different from those existing when such policy was issued, in February, 1865, and the persons insured in such policy had no knowledge, when they took the same, of any of the prior applications or surveys, although they knew the property had been insured. The agent, if he had any knowledge of the former applications and surveys, also knew they were so defective and incorrect as to make the policy sued on worthless to the insured. *Held*, that, under these circumstances, it was not to be presumed that either party entered into the contract of insurance in question in view of, or subject to, former surveys, the contents of which were either unknown to the parties, or were known to be fatal to the efficiency and validity of the policy issued.

*Held, also*, that the insured were not identified with surveys previously filed by other parties, in such a manner as to estop them from denying that the representations in such surveys were theirs, or that they were responsible therefore.

Extrinsic evidence may always be adduced to ascertain the interests intended to be insured, and a survey may be had in accordance with such proofs.

The expression, "Estate of Daniel Ross," in a policy, is indefinite, uncertain, and without any specific legal significance. But its signification may be shown by parol, or by any circumstances surrounding the case, and tending to elucidate the purpose of the parties. Parol evidence may be given to establish who were the parties really insured, and such parties may recover on the policy, though not the nominal parties thereto, or named therein.

Thus, if the evidence shows, conclusively, that such insurance was effected for the benefit of the widow, heirs at law and next of kin of the person named, they, or their assignee, may recover upon the policy.

Under an executory contract, by the widow of a deceased owner of real and personal property, and the guardian of his infant heirs, to sell such property to the plaintiff as soon as the necessary authority could be obtained from the court, for the special guardian of the infant heirs to convey, the plaintiff went into possession of the premises as tenant of the estate, at a specified rent. The property was insured by the defendant in the name of the deceased's "estate," and before any conveyance was made, the same was destroyed by fire. *Held*, that the contract was not one which could be specifically enforced by the plaintiff; nor did he acquire any legal or equitable

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title to the property, or become, in any sense, the owner of it. That he had no equities, no insurable interest, nothing at risk, and, consequently, suffered no loss; but that the estate of the deceased, by such loss, acquired a right of action to recover the amount insured, up to the value of the property destroyed.

*Held, also*, that a deed of the property, subsequently executed by the special guardian appointed for that purpose, was an exception to the rule, that, on judicial sales, the deed takes effect, by relation, from a time antecedent to the date; inasmuch, as by the contract between the parties, it was not to take effect, as a contract of sale, until the deed was executed and delivered, but was, up to that time, a lease of the property. And whatever the law may be, in the absence of a contract, parties may control its operation by their contract.

When there is no valid contract for the sale of real estate, there can be no relation to one.

Where property contracted to be sold, after being insured, was destroyed by fire before any delivery or conveyance, in consequence of which the vendors were unable to perform, and the purchaser was unwilling to perform, by taking what was left, and paying the price originally agreed upon, a new contract was made, by which the purchaser took what was left of the property, and an assignment of the rights of action on the policy of insurance, in lieu of the real and personal property agreed to be sold; *Held*, that this was not the performance of the old, but the making and executing of a substituted contract; and that there could be no principle of subrogation applicable to the case, in the interest of the vendors.

*Held, also*, that the purchaser, as assignee of the policy, was entitled to recover the amount of the policy, provided the value of all the property destroyed equaled or exceeded the amount insured therein.

In construing a policy of insurance, the written part is to prevail over that which is printed.

If no request is made, on the trial, that a matter be submitted to the jury, as a question of fact, the objection that it was not submitted, cannot be taken on appeal.

THIS action was brought to recover on a fire insurance policy of \$3000, \$835 of which sum was upon the buildings and fixed machinery of a New Berlin cotton mill, and "\$2165 on movable machinery therein, as per survey on file at the office of" the defendants' agent. This policy was given by the defendants to "estate of Daniel Ross," and the defendants had notice of \$23,000 insurance, in all, upon the same property.

Some time before the death of Daniel Ross, he had

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obtained a like insurance on the same property, and at that time a survey, referred to above, had been made out, showing the exposures of the property, and filed with the insurance agent. After the death of Daniel Ross, and on the 27th of February, 1865, the policy in suit, with others, was issued for the benefit of the widow and heirs. The issuing of the new policies in lieu of the renewal of the old policies, was the act of the agent.

On the 29th of May, 1865, a contract was made between Ross' widow and Tew, guardian, for the sale of all the insured property to the plaintiff for \$23,000, as soon as a special guardian's deed could be procured through the courts, and in the meantime the plaintiff was to enter into possession of the premises and hold them as the tenant of the estate, at the rate of \$1500 per annum rent, until the deed was executed and delivered. At this date Tew was the general guardian of the children and had been appointed their special guardian, but had not yet been authorized by the court to contract for the sale of the real estate. On the third of June, following, Tew was authorized to contract for the sale of the real estate for not less than \$10,000, and reported that he had made a contract for that price, though no other contract than that of May 29th, appears to have been made. On the same day, (June 3d,) Tew's report was confirmed and he was directed to convey the interest of said infants to the plaintiff, "upon his complying with the terms and conditions upon which by said agreement the deed was to be delivered." These reports and orders were not filed or entered till November 3, 1865. The plaintiff went into the possession of the property insured, May 29th, but before the proceedings for the sale of the infants' interest in the real estate were perfected by the execution and delivery of the deed of the special guardian and widow, the property was destroyed by fire on the 28th day of June, 1865. On the 4th of November, 1865, the widow and the special guardian for the heirs of Ross con-

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veyed the title of the real estate to the plaintiff, and at the same time assigned to him their claims for losses under this and other policies, the plaintiff paying therefor the sum of \$22,000, besides rent from the 29th of May.

This action was commenced about December 1, 1865, and resulted in a verdict for the plaintiff for \$3366.32. The exceptions were ordered to be heard in the first instance at the general term.

*H. L. Comstock & E. G. Lapham*, for the defendants.

*J. E. Dewey*, for the plaintiff

*By the Court*, BOARDMAN, J. Objection by the defendants was made to the decision of the judge, holding that the application and survey of 1863, made by Daniel Ross, should not be deemed or taken to be a warranty on the part of the estate of Daniel Ross, deceased, in 1865. There can be no doubt that when an application and survey is made by the insured, to accompany a policy, or is referred to as forming a part of such policy, such application, survey and policy are to be construed together as part of one entire contract. (*Ripley v. Aetna Ins. Co.*, 30 N. Y. Rep. 136.)

In this case three separate surveys of the property in question had been made prior to the issuing of the policy in suit, and were on file in the office of the company's agent, the earliest bearing date in 1860 and the latest in 1863. All of these were signed by other persons than those insured under this policy. All were made under circumstances wholly different from those existing in February, 1865. Nor is it claimed or pretended that the parties insured under the policy of 1865 had any, even the slightest, knowledge of any of the prior applications or surveys. They knew the property had been and desired it should continue to be insured. They therefore applied

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for policies upon the property in its then position, not then being in use. The agent of the insurance companies knew the mills were not running, and if he had any knowledge of the former applications and surveys he also knew they were so defective and incorrect as to make the policy worthless to the insured. Under such circumstances it would be absurd to suppose that either party entered into this contract of insurance in view of or subject to former surveys, the contents of which were either unknown to the parties or were known to be fatal to the efficiency and validity of the policy issued. In the construction of contracts courts will always bring them as near to the actual meaning of the parties as the language used and the rules of law will permit. (2 *Pars. on Cont.* 494.) The subject matter, the position of the parties and the intention and purpose of those making the contract, are often guides to its construction. The contract should be supported rather than defeated, whenever it can be done by a fair and rational construction of the language used. (2 *id.* 503, *fc.* and cases cited. *Hoffman v. Aetna Ins. Co.*, 32 *N. Y. Rep.* 405.) In the case at bar the survey is referred to in that portion of the policy which is written in and is plainly and simply the means used to identify and describe the property to be insured. This is the more apparent since the reference by its terms refers to no particular survey, though three, made at different times, of the same property, were on file at the agent's office. The printed allusions subsequently made in the body of the policy are such as are always used, even where no survey is made, and in such case that which is written shall prevail over that which is printed. (17 *N. Y. Rep.* 194.) It is quite evident that the insured made no formal application, furnished no survey of the premises, which could or ought to impair the validity of their policy. Nor are they in any way identified with surveys before that time filed by other parties, in such a manner as to estop them from denying that the representa-

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tions in such surveys were theirs, or that they are responsible therefor. (*Harper v. Albany Ins. Co.*, 17 *N. Y. Rep.* 194. *Ames v. New York Union Ins. Co.*, 14 *id.* 253. *Hoffman v. Aetna Ins. Co.*, 32 *id.* 405. *Rapalee v. Stewart*, 27 *id.* 315.)

Even if these views be incorrect, it was at most a question of fact to be determined by the jury; and as there was no request that such question be so submitted, no available exception is presented for consideration. (*Barnes v. Perine*, 12 *N. Y. Rep.* 18.)

A further objection is taken by the defendants, that this insurance was between the defendants and the "estate of Daniel Ross;" that the "estate of Daniel Ross," means in law "Mary Ross, administratrix, &c. of Daniel Ross," &c; and that she, as such administratrix, had no insurable interest in the real estate; wherefore the recovery for loss upon the realty was excessive and unwarranted.

This position can not be maintained either by reason or authority. What has heretofore been said in regard to the principles governing the construction of contracts is equally applicable here. The intent of the parties, as expressed in the contract, and as understood by them when it was made, should control, and in all cases where the words are equivocal, or of doubtful signification, they should be construed against him who undertakes. (*Adams v. Warner*, 23 *Verm. Rep.* 411. *Love v. Pares*, 13 *East*, 80, *Bailey, J.*) It is apparent that both parties proposed and intended by the words used, to insure the building and fixed machinery, for that is done by the words of the policy. As the heirs had the chief interest in the realty, it can fairly be presumed, without the aid of extrinsic evidence, that such insurance was effected for their benefit. If, however, there was any doubt about the justness of such presumption, the evidence shows conclusively that such insurance was effected for the benefit of the widow, heirs-at-law and next of kin of the deceased. Extrinsic evidence

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may always be adduced to ascertain the interests intended to be insured, and a recovery may be had in accordance with such proofs. (*Lee v. Adsit*, 37 *N. Y. Rep.* 78.) The expression "estate of Daniel Ross" is indefinite, uncertain and without any specific legal significance. But its signification may be shown by parol, or by any circumstances surrounding the case and tending to elucidate the purpose of the parties. That was done in *Herkimer v. Rice*, (27 *N. Y. Rep.* 163,) and in *Colburn v. Lansing*, (46 *Barb.* 37.) It certainly cannot be contended that an insurance company may take the premiums for an insurance of real estate, and pretend to make the insurance as in this case, and then turn around and insist that it is not liable because it insured the estate of a deceased person and not his heirs. (*Springsteen v. Samson*, 32 *N. Y. Rep.* 703. *Hooper v. Hudson River Insurance Company*, 17 *id.* 424. *Bidwell v. Northwestern Insurance Company*, 19 *id.* 179. *S. C.* 24 *id.* 302. *Catlett v. Pacific Insurance Company*, 1 *Wend.* 561; *affirmed*, 4 *id.* 75.) These cases, and others which might be cited, show that parol evidence may be given to establish who were the parties really insured, and that such parties may recover on the policy, though not the nominal parties thereto, or named therein.

Again, it was objected that the property in question had been sold and transferred to the plaintiff before the loss, whereby the policy became void. By the contract of May 29, 1865, the title to this property, real and personal, was to be given to the plaintiff, so soon as the necessary authority could be obtained from the court for the special guardian of the minor heirs to convey, but it was a part of the provisions of the same contract that, until such deed was executed and delivered the plaintiff should hold such property, real and personal, as the tenant of the owners, paying a specific rent therefor. Under this contract the plaintiff went into possession, and was still so in possession when the fire occurred. It is not contended

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that the contract, when made, was valid otherwise than as a lease of the realty, or that Tew then had any right to make a contract for a conveyance of the infants' interests. It was not a contract which could be specifically enforced by the plaintiff, nor did the plaintiff acquire any legal or equitable title. When Tew afterwards obtained from the court a power to contract, and, upon his report, a power to convey, no new contract had in fact been made. The only contract, was the executory contract for the sale of the real and personal property, given May 29. Now, after this full authority had been given to Tew to convey, and before the conveyance was in fact made, all of the personal property and a valuable part of the real estate had been destroyed by fire. Mrs. Ross and Tew were then in no situation to perform their contract. The personal property had been destroyed. They could not, even if their contract had been valid, have compelled the plaintiff to take what was left and pay for the whole.

Hence the plaintiff was in no sense the owner of the property in question. He had no equities, no insurable interest, nothing at risk, and consequently suffered no loss. The estate of Ross by such loss acquired a right of action to recover the amount insured up to the value of the property destroyed.

It is undoubtedly true, as claimed by the defendants, that if the widow and heirs of Ross had contracted to sell and transfer the title to this property to the plaintiff, the loss would have been his, to the extent of the purchase money paid, and if the whole consideration had been paid the policy is at an end. But until the purchase money is fully paid, the insured still retains an interest in the policy, equivalent to the amount unpaid. (*Ætna Ins. Co. v. Tyler*, 16 *Wend.* 385.) It is clear, however, that this principle does not apply unless the defendant's claim is well founded; that the deed given in November, 1865, operates by relation back to the time when the contract of



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sale was confirmed by the court. If it be true that a sale of infants' real estate is of the character of those judicial sales where the deed takes effect by relation from a date antecedent to its date, (*McLaren v. Hartford Ins. Co.* 1 *Seld.* 151; *Gates v. Smith*, 4 *Edw. Ch.* 702,) this case must form an exception, because by the contract between the parties it was not to take effect as as a contract of sale until the deed was executed and delivered. Up to that time, it was a lease of the property. Whatever the law may be in the absence of a contract, parties may control its operation by their contract. In this case it is provided that the deed shall not relate back, but shall take effect from its delivery only. Besides, there was no valid contract for the sale of the real estate, and hence there could be no relation to one. And again the personal property contracted to be sold had been wholly destroyed before any delivery under a sale, and as there was but one contract for both real and personal, the Ross estate, became unable to perform. (*Herring v. Hoppock*, 15 *N. Y. Rep.* 409. *Hasbrouck v. Lounsbury*, 26 *id.* 598.) The plaintiff was unwilling to perform by taking what was left and paying the price originally agreed upon. (*Smith v. McCluskey*, 45 *Barb.* 610.) A new contract was thereupon made, by which the plaintiff took what was left of the property and an assignment of the rights of action on policies of insurance in lieu of the real estate and personal property described in the contract of May 29, 1865. This was not the performance of the old, but the making and executing of a substituted contract. (*Tompkins v. Dudley*, 25 *N. Y. Rep.* 272. *Murray v. Richards*, 1 *Wend.* 58.)

If I am so far correct in my reasoning, there can be no principle of subrogation applicable to this case in the interest of the defendants. It also follows that the plaintiff, as assignee of this policy, is entitled to recover the amount of the policy, provided the value of all the property destroyed equals or exceeds the amount insured

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thereon. The amount of the purchase money expressed in the contract is not conclusive of value. That subject was fairly submitted to the jury, and their verdict is conclusive thereon.

The conclusion I have reached results in the refusal of the defendant's motion for a new trial, with costs, and an order for judgment in favor of the plaintiff upon the verdict, with costs.

All the justices concurring, judgment accordingly.

[BROOME GENERAL TERM, November 17, 1868. *Balcom, P. J.* and *Boardman, Parker* and *Murray*, Justices.]

## **In Memoriam.**

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### **HON. HENRY WELLES,**

A justice of the Supreme Court, for the seventh judicial district, from the organization of the court under the present constitution, in July, 1847, died, at his residence in Penn Yan, January —, 1868, in the seventy-fourth year of his age.

At an adjourned meeting of the members of the bar of the county of Monroe, held in the Supreme Court room in the city of Rochester, soon after his death, Hon. E. DARWIN SMITH, presiding, the committee on resolutions, (Messrs. H. R. Selden, J. C. Chumaseo, Harvey Humphrey, Alfred Ely, Jerome Fuller, Geo. F. Danforth and William F. Cogswell,) reported a series, prepared by their chairman, Ex-Judge SELDEN, which were read as follows:

The bar of Monroe county, deeply deploring the death of the Hon. HENRY WELLES, long endeared to them in all the associations of professional life, and desiring to express their regard for his memory and their estimate of his character as a man and a jurist, do resolve

That in the decease of Judge WELLES, the legal profession, not only of this county and district, but of the state, have lost a judicial officer whose ability and integrity, exhibited during many years of faithful service, have secured their unwavering confidence and esteem.

That all who have been acquainted with his judicial career will hold in grateful remembrance his courtesy and kindness, which were never wanting, but were especially manifested towards the young and the timid; and they will never cease to respect the just views of professional honor and rectitude which were well exemplified in his long professional and judicial life.

That while we desire to express our admiration of his high qualities as a jurist, we cannot but feel that the reports of his judicial decisions will hand down to posterity more enduring evidence of those high qualities than will be furnished by any declarations which we can make.

That the private and social, as well as the professional and judicial character of the deceased, afforded an example worthy of all commendation.

Resolved, That a copy of these resolutions, signed by the chairman and secretary, be furnished to the family of the deceased.

Resolved, That a committee of three members of the bar be appointed to present these resolutions at the next session of the general term of the Supreme Court in this district, and to ask that they be entered on the minutes of that court.

The adoption of the resolutions having been moved and seconded, Judge SELDEN said :

Mr. Chairman: If I were able to speak, and to say what this occasion really calls for, I should be very willing and happy to do so; but my health is such that it is impossible for me to talk to any considerable extent. I can only say, sir, that it is very seldom that a member of the profession, whether on the bench or off, has been taken away, whose loss or death has been so universally regretted. Whatever may be said of Judge WELLES, I think this can certainly be said, that he has left no enemies. Although he never lacked firmness in the discharge of his duty, he was so careful, pains-taking, observant and conscientious in doing it, that every man, whether successful or unsuccessful before him, was satisfied that he had fulfilled his duty honestly, and thoughtfully, and without respect to persons, either of the parties or counsel. He was most conscientious—a man of strict integrity—and that was his conspicuous characteristic throughout his whole career. Though not a man of great learning, he was thoroughly versed in every thing that belongs to the profession. He was one of the old school of lawyers, and almost the only one in western New York whose practice dates back to the time of those able judges who served under the first constitution of this state—Spencer, Tompkins, Van Ness, Yates, and their associates. His career commenced while they presided in our high courts; and I do not remember any other now living in western New York whose professional life dates so far back. And from that time to this, he has, as we well know, discharged his professional duties strictly and without shadow of turning; and for the last twenty years and upwards has been doing the duty of judge of the Supreme Court. He was one of the few lawyers of the present

day—allow me to say, with all respect—on the bench or off—one of the few thoroughly posted in the rules of practice and principles of the Court of Chancery ; a learning which has almost, in modern times, gone out of date. He was eminently pains-taking, careful, courteous, and conscientious in hearing and deciding every case that came before him. I think no man ever saw any thing in his whole judicial career, but uniform courtesy and kindness toward witnesses, jurors, parties and counsel. I never knew or heard of an exception to this. In private and social life he was uncommonly genial, pleasant, cheerful and happy, always. He was always considerate and kind towards the younger members of the profession, and made them feel that they had a friend in him, whenever they approached him ; and I have no doubt that he possessed the sincere affection of every member of the bar. I presume that no judge ever possessed this in a greater degree than Judge WELLES. But, while we have occasion to grieve for the loss of this good man who has died, we know that he has done his duty faithfully, through a long life, and as it is appointed unto man once to die, though his loss is to be deeply regretted, we have all these things for our consolation under the affliction.

W. F. COGSWELL, Esq. said :

Mr. Chairman : I deem it a privilege to make a few remarks upon this occasion, so full of mournful interest to us all. I will avail myself of the few moments that I shall occupy your time, to present some facts in reference to the history of the deceased. Judge WELLES was born at Kinderhook, in the county of Columbia, in this state, in October, 1794, and was consequently in his seventy-fourth year at his death. His father was a physician, and while his son was still a lad of but few years, with a colony of his neighbors and friends, as was then not unusual, removed to the town of Wayne, in the county of Steuben. Upon the east bank of the beautiful Crooked lake he settled, and there the early years of his life were passed. His attachment to this spot I saw clearly evidenced but the past summer, when passing it, he called the attention of those who were with him to the place, and spoke with great and kindly interest of the sports and enjoyments of his early home. For Crooked lake he felt a deep interest, and seemed not a little gratified when one of the company, who was also one of his brethren on the bench, admitted that in beauty of scenery it surpassed even the beautiful lake that lies at the foot of the village of his own home. That patriotic loyalty which characterized his whole life was manifested by his volunteering in the war of 1812, in which war he served in our armies for a period of several

months. He studied his profession in the office of Gen. Vincent Mathews, at Bath, and on his admission to the bar commenced his professional life there, nearly, if not quite, half a century ago. After practicing his profession some ten years at Bath, he removed to the village of Penn Yan, where he continued to reside until his death. He held, before his elevation to the bench, several offices of trust and confidence, among which was that of district attorney of the county of Yates, but he is doubtless best known to the bar and the public by his judicial career. He was chosen a justice of the Supreme Court at the first judicial election under the Constitution of 1846, and in July, 1847, entered upon the duties of his high office. He was twice re-elected to this office with great unanimity. Of all those who were chosen to judicial station at the same time with himself, there remain now on the bench but Justices Mason, Marvin and Johnson. I shall not attempt to speak at length of his many excellencies as a judge. Allusion has already been made to them in the resolutions presented, and they have been and doubtless will be fittingly considered and presented by those who are better qualified to present them than I am. I may be permitted to say, however, that as a judge he was characterized by a sincere desire to do the right, by learning highly respectable, by a patient pains-taking industry which was never satisfied short of an exhaustive examination of the subject under consideration, by a broad common sense which his learning and experience had ripened into a comprehensive judicial wisdom, by a dignified courtesy which was never provoked into petulance or irritability and which never degenerated into unseemly facetiousness.

As a man, he was characterized by a simple ingenuousness, by fatherly kindness, by strict integrity and Christian courtesy.

Of his characteristics in the closer relations of life, it would not be becoming to speak.

Judge WELLES early professed his faith in the Christian religion, and was for many years a member and an office bearer in the Presbyterian church.

I cannot close this very imperfect attempt to speak of his worthiness better than by saying that in his case the prayer of the church in one of its sacred offices has been answered, "that having served God in his generation he has been gathered unto his fathers, having the testimony of a good conscience in the communion of the Catholic church, in the confidence of a certain faith, in the comfort of a reasonable religious and holy hope in favor of God and in perfect charity with the world."

Hon. JOHN C. CHUMASEBO, remarked as follows:

Mr. Chairman: We are called upon to-day to mourn the loss of a good and noble man. Judge HENRY WELLES, who has so long adorned the bench of this district, whose virtues as a citizen, have been so long the admiration of us all, has rested from his earthly labors, and gone to his reward. How impressive and solemn the reflections of the hour! We must all die. The King of Terrors is a relentless monarch; from the highest to the lowest, all must bow beneath his stern, inexorable mandate. Talent, nor wealth, nor power nor station, can aught avail against the fixed, irrevocable decree, *that all must die*,

*"Pallida mors æquo pulsat pede, pauperum tabernas regumque turres."*

I have the happiness, Mr. Chairman, to be intimately acquainted with the deceased. In the relations of private life, I knew him well, and can bear testimony to his kindness and social character. In Penn Yan, where he had so long resided, no man was held in higher or more general esteem—he was, I may say, almost worshipped by his fellow-citizens. He never held himself above other men; none were so humble as not to become the recipients of his kindness; none ever came to him in vain for assistance or advice. The young men, especially those of the profession, looked up to him as a father, and enjoyed his counsels.

He was undoubtedly a true Christian; not, perhaps, as demonstrative as some in respect to his religious feelings and belief, but a sincere and humble Christian. He will be mourned, indeed, yet not as one stricken down in the flower of youth and promise, for he lived a long and useful life, and the winter of his days was upon him. He had filled the measure of his years, dying, like John Quincy Adams, with "his harness on," occupied almost up to the last hour, with the business which he had to do; a suitor waiting, on the last day, for the performance of an official duty by him. He passed away full of years and honors, not reluctantly nor in doubt of his future place, but calmly, quietly, serenely laying aside the ermine, spotless and unsullied as he took it, he fell asleep, as one

"That wraps the drapery of his couch about him,  
And lies down to pleasant dreams."

Hon. ALFRED ELY, said:

Mr. Chairman: Those who have preceded me have very fully expressed my views in regard to the many virtues of the late Judge WELLES, and the estimation in which he was held, as an able, sound and discreet judicial officer. I desire, on this occasion, to express my concur-

rence in the sentiments of the resolutions reported, and in the remarks that have already been made in reference to our deceased friend. I have known Judge WELLES for many years, and from the earlier days of my practice in the courts of the state, I have always marked with great satisfaction his uniform kindness to the younger and more inexperienced members of the bar, evincing that goodness of heart and kindly disposition which made him respected and beloved by all with whom he came in contact. We have all noted the care and deliberation which characterized his action on the bench, and however counsel might differ, confident for the time in their own view of the law, they were always well assured, when questions were submitted to him, they would receive an honest opinion, uninfluenced by any momentary excitement, and without partiality for personal friends.

Mr. Chairman: We all felt, when the death of Judge WELLES was announced, that we had lost a friend, and that from the judiciary of the state had departed one of its soundest and most esteemed judges.

His example in the private walks of life, as a lawyer, and on the bench, are worthy of all imitation.

The, younger members of the profession who pattern after him whose departure we mourn to day, have a model of excellence which they may copy with the highest advantage. He was honest and discreet as a counsellor, firm and conscientious as a judge, and while every member of this bar accords in the sentiment that a great and good man has been taken from us, they will, nevertheless, in all future time, refer with pride and satisfaction, to the memorials he has inscribed upon the records of the courts as the more lasting and enduring monument of his fame.

P. J. CLUM, Esq. said :

Mr. Chairman: This sad occasion, in all human probability, will present the only suitable opportunity for me to give public expression to my love and esteem for the honored and lamented Judge WELLES. A learned, upright and pure minded judge; a noble, good hearted and conscientious man; a sincere, confiding and reliable friend; and a citizen of irreproachable character, has disappeared from our midst, and we shall look upon him no more forever.

My acquaintance with the lamented deceased jurist dates back to the first judicial election under our present constitution, in which he and another noble "Roman," now still administering justice in its purity, in her sacred temple, first received the confidence of the electors of this judicial district, and together traveled in the pathway of judicial duties



and honors, for nearly a quarter of a century, wearing the ermine with dignity; and it is unsoiled.

But Judge WELLES is gone. Death, as it will, sooner or later, overtake and bring under its dominion all that is mortal, marked him as its object, and his heart, his noble heart, has ceased to beat. And our last sad office is, with reverent hands, to consign that noble form to kindred dust.

As a judge, he stood the equal among his peers, excelled by none. Extensive and accurate learning in the laws; a full and just appreciation of the duties and responsibilities of the bench, and the duties and privileges of the bar; a conscientious regard for the sacredness of the laws, and its impartial administration; with an integrity and a rare kindness of heart, were among his leading characteristics as a judicial officer. Between parties, he always held the scales with a firm and even hand. Towards the members of the bar he was uniformly courteous and respectful. He slighted none; no sensitive heart was ever wounded by a bitter word, or chilling repulse, from Judge WELLES. The most timid and obscure could ever approach him with confidence, and be assured of a respectful hearing, and an honest and unbiased disposition of his cause; while the most fortunate and favored practitioner before him could not expect to be allowed an undue advantage over his more humble competitor.

The dignity and integrity of the bar he ever held in high esteem, and would tolerate nothing in the practice which tended, in the least degree, to lower its dignity, and bring it into disrepute; and required of all its members strict integrity, truthfulness and candor in the practice, and that respectful and courteous demeanor becoming members of a learned and honorable profession, and cultivated and dignified gentlemen.

The extent of my acquaintance with him, both sociably and professionally, has enabled me to form a correct estimate of him as a jurist, a citizen and a friend; and it is but a just tribute to his memory, for me thus publicly, upon this melancholy occasion to bear my willing testimony in favor of his pre-eminence in each and all of these characters. In his nature, too, he was unselfish and self-sacrificing, ready upon all proper occasions to make a sacrifice of his own comfort for that of others. I well remember the occasion of the last special term held by him at Penn Yan, the village of his residence, last fall, when a number of the members of the bar, from this city and other places, on a cold and unpleasant day, assembled in the court room, which had been neglected to be properly warmed by those who had it in charge, when, upon the arrival of Judge WELLES, he at once gave to it his personal labor and attention, after which he

severely reprimanded the officers for their neglect, which had caused so much discomfort to the gentlemen who were there from abroad, and then quietly took his seat upon the bench and proceeded with the business of the term.

This, I believe, was the last time I transacted any business before him in this district. After the adjournment of the court, I was favored, for a short time, with a friendly conversation with the Judge, in the course of which I was deeply impressed with the deep feeling, and subdued manner in which he spoke of the death of his son, who had recently died, and left his stricken father disconsolate and in sorrow. This sad allusion to his bereavement brought up from the depth of his soul the strong feelings of parental affection, and gave forth their expressions in these external manifestations. And with the parting grasp of his honest hand, I left that noble soul in tears, leaving him through the anguish of his heart at the loss of his darling son to contemplate his immortality.

The last time I saw him was at the Court of Appeals, on the first day of its session in the last January term. I imagine I still feel the warm and cordial pressure of his hand as he clasped mine while passing from the door to his seat upon the bench, and see the pleasant smile and fraternal greeting, which he never failed to extend to me whenever we met, and remember the kind inquiries he made about friends in Rochester—all are yet fresh in my memory.

Far from me, then, was the thought that that cordial grasp of the hand, that benignant smile, those kind and affectionate words from my departed friend, were destined to be the last upon earth. And when I gazed upon his honest, intellectual countenance, and venerable and manly form as he sat upon the bench of that august tribunal of justice, the equal of all, inferior to none, with feelings of just pride of the worthy representative of my district, in that tribunal, I little suspected that death, so soon, would make such havoc in that court, and, ere the close of that week, draw within his fatal embrace, and lay prostrate under his power, its honored chief; and that before the next term would, also, with rude and ruthless hands, take from that seat of justice, and from our midst, that noble character, whose loss we have assembled here to mourn, and whose memory to honor. But he is gone; and we are here to bedew his grave with our tears, and bestow upon his memory this last tribute of our affectionate regard and esteem.

Who shall fill his place? Who, among the many able members of our profession, in this district, can so worthily occupy the seat which he has left vacant here? Who can fill it as he filled it? And who, like

him, so long can wear the ermine unsullied? These, however, are matters for future consideration. Be it our concern to emulate his worth, imitate his example, study carefully his many virtues and noble qualities, and be prepared to meet him in that other and better world.

GEORGE G. MUNGER and GEORGE F. DANFORTH, Esqs. spoke briefly and feelingly of the departed judge.

Justice SMITH, (in the chair,) said he could hardly refrain from saying a few words upon this occasion, in expressing the regret which his associates on the bench felt at the death of their brother WELLES. He, (Judge S.) felt that no more just, upright and conscientious judge ever sat upon the bench. It seemed to him that all who had known him as a judge must admit this to be so. He was not as rapid as some in seeing the points of a case, and in gathering the law and the facts, but he was always sure in the end. We were always satisfied that he would come to a sound conclusion; and no doubt his conclusions and judgments were much more sound and reliable than those of judges who were more swift in execution. He was always careful to come to a just decision, and was never willing to give a decision in a case which he had not fully considered. For this reason, he was always a great help to the judiciary of the state, in and out of the Court of Appeals. To his associates on the bench of this court, who have been in intimate and familiar intercourse with him, his loss will be deeply felt. His warm hearted and genial temperament and affectionate disposition endeared him to those who knew him best, and I think no four judges have ever been associated more cordially than those of this district, and none had the love of all in a greater degree than Judge WELLES. He has gone to the grave full of years and of honors, having spent a long life in the service of his profession and country, and by his ability and the soundness of the judicial decisions which he has rendered, has conferred a lasting benefit upon his district and the state.

The resolutions were adopted.

Mr. COGSWELL moved that Hon. H. R. SELDEN be requested to bring this event to the notice of the Court of Appeals, of which Judge WELLES died a member, at the next term of the court, and ask that proper action be taken. Agreed to.

Messrs. Munger, Newton and Judge Fuller were appointed a committee to announce the death of Judge WELLES in the Supreme Court.

At the opening of the general term of the Supreme Court, for the Seventh Judicial District, held at Rochester, June 1, 1868; present E. Darwin Smith, Presiding Justice, and Thomas A. Johnson, James C. Smith and Charles C. Dwight, Justices.

Hon. GEO. G. MUNGER, addressed the court as follows:

*May it please the court:* I hold in my hand the proceedings of a meeting of the bar of this county, held on the 7th day of March last, upon the occasion of the death of Hon. HENRY WELLES, one of the justices of this court, and as one of a committee appointed at that meeting and charged with the duty of presenting those proceedings to this court, and of asking that they be entered in its minutes, I rise to make that request.

Those proceedings will speak for themselves, and will convey, more truly than any words of mine could express, the sense of sorrow which pervaded the large assemblage there congregated, and of the great loss which was felt to have been sustained by the public, and especially by the cause of the administration of justice, in the death of such a man.

Judge MUNGER then read the above resolutions adopted at a meeting of the Monroe county bar, and said:

In presenting these proceedings I crave the indulgence of the court in accompanying them with a few remarks. In so doing I do not intend to utter one tithe of what my respect for the memory of Judge WELLES, my admiration for his many virtues, and my love and affection for him as a friend would prompt me to say; neither is it my intention to enter upon any extended biographical sketch of him. Whatever of that might be necessary or appropriate in this presence has been amply done in the proceedings which are here furnished. I feel rather like making a few brief comments upon points of his professional and judicial character, to the end that my contribution, however feeble, may go upon the record in humble appreciation of some of the many useful and noble traits and qualities of which the people of this state have been deprived by this dispensation of providence.

Judge WELLES was a connecting link between three generations of lawyers, or rather between three systems of law in our state. His earliest practice was under the Constitution of 1822. His next experience was under the Revised Statutes, which created a change of system hardly less novel and radical to the then race of lawyers than was the Code to the profession of the present day. Upon the inauguration of the existing system he had been in practice about thirty years, and his large and varied business had introduced him to every court of the olden time, to the court

for the correction of errors, to the Supreme Court, to the court of chancery and to the court of common pleas. His private practice, together with a public position which he had held, the district attorneyship of the county of Steuben, had grounded him well in the system of every one of these courts, and upon the institution of the present system the eyes of the profession in that part of this judicial district in which he resided, turned instinctively to him as a proper man to be entrusted with a share of the experiment then to be tried. How judicious was that selection is best attested by his continuance for the remainder of his long life in the position to which he was then elevated.

Judge WELLES was eminently fitted for judicial life; in that capacity he was indeed "the right man in the right place." He was a sound lawyer, he was industrious, he was discriminating, he was moderate, he was honest and independent, and he possessed all of these qualities which are so essential to an able and useful judiciary in no slight degree, but to a remarkable extent, to such an extent as to have permanently left his influence upon our judicial system, and to have bequeathed to his countrymen and to posterity a useful legacy to the undying example of well administered law, and of valuable contributions to legal science.

This beneficial influence was especially felt in the earlier years of our present system, when his varied knowledge both of the common law and of chancery law was particularly desirable in courts for the first time in the history of this state, uniting the powers and functions of those formerly distinct systems. He entered upon the discharge of his duties with great industry and directness of purpose, and the student of the earlier volumes of Barbour's and Howard's reports will find the traces of his judicial labors to be quite as numerous and quite as valuable as those of any other member of the Supreme Court. His well considered and well reasoned opinions, both upon new questions of practice and upon questions of principles of law, may be reckoned by the hundreds, and his contributions thus made to our judicial lore would in the aggregate fill volumes.

I will not in any spirit of fulsome eulogy claim for his written opinions that they were models of judicial style. They certainly do not possess that beauty of diction, that wealth of language, that fertility of thought, or that close analysis which are to be found in the books, but for clearness of expression, thoroughness of discussion for all practical purposes, calmness, impartiality and all absence of pretension, show and bigotry, they are certainly far above mediocrity. His opinion in the leading case of *Field v. The Mayor of New York*, may be cited as a fair illustration

of his manner in this particular. It settled a new and important question, by language just sufficient to express in no ambiguous terms the views of the court and to indicate clearly the limits and boundaries of the decision, and did all this with a citation of authorities, not ostentatious, but sufficient to render his reasoning impregnable. It might, perhaps, be urged with considerable force that such opinions are practically quite as valuable and useful as those which indulge in an elaborate essay upon every question with which they are dealing, and which, while they display the learning and exhaustiveness of the writer, do not always enunciate succinct and clear rules of guidance for the profession.

Judge WELLES was actuated by a sincere desire to discharge his duty thoroughly *wherever* he met that duty, and as a consequence it may be remarked of him that he was very pains-taking as a general thing with his special term cases. He did not give way to the idea that his labors here might be less for the reason that the general term or some appellate court would have more time for reflection and examination. He regarded it to be a full duty resting upon him at this stage of a cause to give his best energies to its disposition and to endeavor to decide it then and there for all time. It is not surprising, then, that his special term decisions will bear favorable comparison with those of any other judge on the bench, and that they have frequently been affirmed by the appellate court without any new opinion being written, but simply by the adoption of the one written by him below.

The fearless integrity and modest independence with which he discharged his judicial duties are deserving of special mention. In the trial and decision of causes, he avoided, in my judgment, as fully as the infirmities of mortal nature will permit, the influences of passion, or of personal sympathy, or favoritism. He looked right over and beyond the counsel, and the parties, whoever they might be, and saw nothing to guide him but the simple behests of the law. Especially was he free from all extraneous and outside influences of public opinion. In his administration of the law, he acknowledged no rule of action, no criterion of conduct, but that which his conscience afforded, after recourse to that true source of inspiration for any one entrusted with a judicial duty, a patient consultation of the recorded authorities upon questions of eternal right and justice.

An illustration of this independence I have in recollection. It was the case of a man convicted before him in this city a few years ago, of the crime of murder. The evidence as to his guilt was most convincing, but his counsel applied to the judge, after the trial, for the allowance of a

writ of error, on the ground that the court had made one or two erroneous rulings upon important points. The questions thus raised fairly admitted of argument, and with the feeling that any accused party has the right of a clearly fair trial, and that no man, however guilty, should be convicted while substantial principles of law had been violated, he allowed the writ and stayed the proceedings, and thereby enabled the prisoner to have the alleged errors pass under solemn review, although a popular clamor was then raging for the speedy execution of the criminal. I know of my own knowledge that he passed that popular clamor by as the idle wind, realizing his duty, under our laws, and to his God, that however fully his private convictions concurred with the popular estimate of the prisoner's guilt, the sacred forms of the law were to be kept in remembrance and respected, even though justice should thereby be more slow of foot.

This independence of character was like all his other traits, modest, unassuming, unostentatious. He made no parade of it, and exercised it only to the extent of conscientious discharge of duty, and never allowed it to degenerate into factiousness, or unseemly pride of opinion. By words of his own in a celebrated case, he has unconsciously afforded us the best possible illustration of its nature. I refer to the case of *Newell v. The People*, in the Court of Appeals, which involved very grave questions of constitutional law, and which attracted at the time a large share of the public attention. He was constrained to differ from all his brethren in regard to the disposition of the cause, and wrote a long and able dissenting opinion, closing with the following lines which are so happily illustrative of the trait upon which I am now dwelling, that I feel like producing them here. "I have now gone through with a consideration of all the objections which counsel have thought worthy of being presented to the constitutionality of the act in question. My own mind is not perplexed with the slightest doubt in regard to either of them. I have attempted to meet them fairly and candidly, and have shown, as it seems to me, that they are separately and collectively entirely untenable. In the conclusion to which I have arrived I regret to find myself standing alone among the members of the court of dernier resort who take part in the decision. This circumstance, perhaps, should lead to a distrust of my own judgment, even if it fails to shake my confidence in the correctness of the views I have expressed. However this may be, I yield to the decision, if not willingly, yet respectfully."

I am conscious of having already trespassed upon the time and indulgence of the court, and shall therefore refrain from that notice of the

virtues and graces of his personal character which would be consonant to my feelings. I shall do so in the hope that those who are to follow me, who have known the deceased longer, and, perhaps, more intimately than I have, may pay some fitting tribute to those qualities of head and heart, which went to make up the almost perfect character of the pleasant companion, the warm hearted friend, and the consistent and sincere Christian.

I turn from my labor of love, which has been thus imperfectly rendered, with the feeling that this great and good man has disappeared from our earthly view, not as some brilliant meteor flashing for a moment athwart our gaze, and then shooting as suddenly into darkness and oblivion, but rather like some orb of genial radiance, whose setting will be succeeded by a long twilight of gently teaching example, and kindly remembered virtues.

E. G. LAPHAM, Esq. seconded the motion in the following manner:

*May it please the court:* In rising to second the motion just made, I perform a pleasant and yet a melancholy duty. My acquaintance with Judge WELLES, as a jurist, began very soon after I commenced the practice of the law. He was chosen to the bench shortly after I entered the legal profession, and I have known him more intimately than any other justice of this court. I most fully and cordially subscribe to all that has been so well said of him, as a judge, by the gentleman who has preceded me, and to what is contained in the proceedings he has read.

Although thoroughly conversant with the technical rules and distinctions of the common law, and also of the civil law, yet such was Judge WELLES' love of justice, that he was never led away from the consideration of the right of a controversy; and the justice of the case was the polar star by which he aimed to be guided, in all his investigations.

His rare endowments as a judge were so well and publicly known and appreciated, that the customary expressions of grief, at his loss, were not confined to his own district; but, in remote parts of the state, and especially in the city of New York, the bar, and courts, gave appropriate and sincere expressions of the same character.

Not only was Judge WELLES patient and unwearied in his judicial investigations, but in all public affairs, whether relating to his own locality, to the state or nation, he always manifested a deep and lively interest. The same extensive reading and reflection which gave him grasp of mind to solve the most difficult legal problems, also enabled him to possess a full comprehension of public affairs.



The last time I saw him alive, was in my room at Albany, when I had a conversation with him, in relation to the exciting topics of the times; and I have never known him to evince more zeal and interest in relation to the affairs of the government than on that occasion.

Of his domestic and social life I may be permitted to say a word. Having enjoyed his hospitality, and known him in his own home, I can speak from knowledge. In all the relations of the family and of society, he was inferior to none; he had no superiors. His life was a model of those virtues and accomplishments which adorn the family and shed lustre upon society, wherever found. Such was Judge WELLES; as a public officer—as a citizen—as a friend and neighbor, and as the head of a family.

In his death, since it must come, we have the rich consolation that his life of so great and varied usefulness, was spared, beyond the allotted period of human existence, and that he has fallen at last, as the ripened grain falls before the reaper's sickle, only to be gathered to the bountiful harvest in the Great Granary above.

It only remains for us, of a later generation, to each strive to imitate and emulate his example, and to resolve so to live, that we, like him, may be prepared for the summons, when it comes.

Hon. SCOTT LORD, of Geneseo, made the following remarks:

*May it please the court:* My first acquaintance with Judge WELLES was about twenty years ago, after he was elected as one of the Justices of the Supreme Court for this district.

One remark of the gentleman who made the motion now before the court, and which I am permitted to second, reminds me of a conversation which I had with the late Judge Hastings, of Livingston county, many years ago, after the adoption of the present constitution, and before any nomination for judges. Judge Hastings had lived many years in the district and was well acquainted with the members of its bar. I had been in the district but a short time, and but little acquainted with the profession. I asked Judge Hastings, of an opposite political party, who would be the nominees of the controlling party in the district. He replied, HENRY WELLES, of Penn Yan, will, of course, be one of them, proving the truth of the statement of Judge Munger, that the legal mind of the district, instinctively turned to Judge WELLES, as a person concerning whose fitness for the place no question could be raised.

The courteous manner of Judge WELLES, upon the bench, and his cordiality and generosity in private life, made him many friends. I call to mind no person so much my senior with whom I formed a more swift

or intimate acquaintance; I remember a circumstance illustrating both his kindness of heart and generosity of opinion in dealing with others. I had the good fortune or *misfortune* to be elected county judge while much younger than the age which our lamented friend, Orlando Hastings, was in the habit of fixing as the minimum of judicial qualification. On one occasion, before I had ever seen Judge WELLES, and perhaps before I had found out that county courts are not infallible, I criticised a decision made by him overruling one I had made, but in language which, reported correctly, would have given him no offense; but it was misreported. After we had become acquainted, he mentioned to a mutual friend what he had heard, and suggested the probable misapprehension, which resulted, as such generosity of judgment almost always will, in removing an unpleasant remembrance.

As years passed on, it was pleasant to meet Judge WELLES. I think it was peculiarly gratifying to him to feel that he was helping young men over the rough roads of early professional life.

But those who saw him only on the bench, could not know his influence in the social circle, with the young as with the old. I recollect, at least, one household, whose children for many anniversaries were made jubilant by what he taught them on one of the few Thanksgiving days he spent so far from home.

His deliberation of manner and great caution at the circuit, as well as in all other tribunals, although at the circuit it sometimes subjected him to the criticism of not being very swift in despatching the business of the court, gained for him the public confidence in an eminent degree, and undoubtedly prevented many appeals.

All of us remember the great dread which perhaps a majority of the profession had of an elective judiciary. It was by the election of such men as Judge WELLES that confidence was restored. Independent and honest judges will so command the confidence of the public that, as a rule, particularly in regard to the higher courts, they can remain upon the bench for life, if they so desire.

It may not be improper, as an instance of the hold which such a judge has upon the public judgment, to refer to the last time Judge WELLES was elected. Many persons then thought, or claimed to think, that he was too old for the position. He was nominated by his party, and a judicial convention of the other leading party was called, of which latter convention I was a member. It was urged most earnestly upon the democratic convention that it could nominate a man who could be elected. The age of Judge WELLES was considerably over estimated, by gentlemen

present, who did not intend to deceive, but being much younger, and recollecting him as a leading lawyer when they were quite young, were honestly mistaken. I believe that the large majority of that convention thought that Judge WELLES, on this account, could be defeated, and yet, after a full discussion, consuming most of the day, it was resolved that a judicial office ought not to be a strictly party office, and that in consideration of the fact that the other party had nominated a man of large experience, eminent ability, and unquestioned integrity, the convention then assembled would make no nomination.

It is said that our celestial brethren across the sea have in each household an ancestral room, where are treasured, on suitable tablets, the names and the more valued tokens of respect which have been awarded to the departed. If such should be gathered for our departed and lamented friend, whose death has convened us on this occasion, I doubt whether among them would be any more significant of the public regard for his capacity, worth and integrity, than this action of an adverse political convention, whose assurance of party success was yielded, as a tribute to his judicial fitness.

But, if the court please, with the relations higher than any which pertain to this life, which existed between Judge WELLES and myself, as office bearers in the same branch of the church, it would not be proper that I should close without referring to the fact, that I have heard his public utterances, not only from the bench, but, while holding court far from his home, have heard his voice in unison with that praise and worship so, at least, faintly typical of the universal harmonies with which it is now permitted to mingle in that world of light, through the merits of the atoning Lord, in whom he trusted all his hopes for the future.

DAVID RUMSEY, Esq. also addressed the court :

I deeply regret, your honors, the dispensation which calls upon me to add my tribute of respect for one, who, while living, I loved, and whose memory, since he is dead, I revere. It was my good fortune to know Judge WELLES many years, longer, perhaps, than any other person present. Indeed, I can not call to mind the time when I did not know him, and his warm greeting, his kind advice and his genial manner are among the earliest recollections of my life. He came, as I understand, while yet a child, with his father, to Steuben County, in the latter part of the last century, and settled upon a new farm pleasantly located on the banks of the Crooked Lake, in the town of Wayne. As he approached his

majority, he was, for a time, engaged in mechanical pursuits, which he early abandoned for the purpose of acquiring an education, and soon attained all the knowledge of books which the limited means a new settlement in a sparsely settled county afforded. When these were exhausted, he was wholly dependent upon his own energy and perseverance for all further attainments, and his subsequent life shows how well that energy and perseverance was rewarded. He entered as a student the law office of that able and learned lawyer, the late Vincent Matthews, at Bath, and aided by the funds derived from teaching school, was enabled to complete the long clerkship then required by the rules of the old Supreme Court. Under such tuition as he had, with his studious habits and sound mind, he could not have been other than a good lawyer. It is not, however, your honors, necessary I should speak of his attainments as a lawyer or judge. The gentlemen who have preceded me have well and truly stated his standing in that regard, and the reports of this state bear abundant evidence that he was an able counselor and a just judge. With the record of his labors as it is there written, his friends are well satisfied.

Among the many able men in the legal profession, who adorned the Steuben bar at the time I commenced reading, from my own choice, and with the cordial concurrence of my friends, I selected the office of Judge WELLES as the one in which to read law, and entered it as a clerk. I continued with him in that capacity until about the year 1828, when he removed from Bath to Penn Yan, and having at that time become so familiar with the practice of the courts as to be able to aid him in the laborious duties then attending the practice of the legal profession, at his request, I went with him to his new residence, and there continued an inmate of his family during the remainder of my clerkship. Whatever of success has attended me in the practice of my profession I owe to the thorough teachings I received from him; and while I remember him with feelings of gratitude for his faithfulness as such teacher, it is as the presiding genius of his own family, in the every day enjoyment of his own home life, that I best love to think of my dead instructor and friend. His own fireside was the place in which his admirable qualities as a man and a Christian best developed themselves, for he seemed to realize that there was the spot to which he must return for quiet repose after the cares of his profession were laid aside for the day; that there, he could enjoy life's purest joys, and there he hoped and expected to die. No one who has enjoyed his hospitalities can fail to remember the easy grace with which he dispensed them, and those only who were members of his household can bear testimony that each day found him the same

affectionate husband, firm yet kind and indulgent father, the genial host, and the same consistent Christian friend and master in his family. He indeed made his house what every home should be, the place loved by himself, loved by his wife, loved by his children, to which each one returned with joy, and where all staid with pleasure. And I may be permitted to add that his children in their subsequent lives, showed that the kind care and Christian culture he gave them was well bestowed. My residence in his family is among the bright spots in my life, and while I regret his loss, I hope his example may teach us to so live that like him we may leave a good name, and like him we may at last depart with the same well founded and glorious hope of a blessed immortality.

D. B. PROSSER, Esq. of Penn Yan, also eulogized the eminent judicial, social and Christian character of Judge WELLES, whom he said he had known for nearly half a century, and to whose memory he with a melancholly pleasure, paid a passing tribute.

At the close of the above gentleman's remarks, Hon. E. DARWIN SMITH said the motion to enter the resolutions introduced by the committee on the minutes of the court was granted. He feelingly indorsed all that had been said of Judge WELLES. At the meeting of the Monroe county bar, he had taken occasion to express his sorrow at the death of him who was an honor to the bench and the bar, and who was respected and beloved by all who knew him. This, the first time that the court has convened since his death, is most appropriate to recall to memory the many great virtues and characteristics of so worthy a man,



# INDEX.

## A

### ACTION.

1. A competent authority, having jurisdiction over the subject of assessment for the purposes of taxation, and over the plaintiffs' property, assessed the plaintiffs for personal property. The plaintiffs complained and applied to the courts for redress. Before the final decision in the Court of Appeals, the officer having charge of the collection of taxes gave a notice to the plaintiffs, requiring payment, and stating that in the event of non-payment, a warrant would be issued, to collect the same. The plaintiffs then paid the assessment. There being no warrant, no seizure, no threatened seizure, no payment of money to free its property from the possession of another, no ignorance of facts; *Held* that this was a purely voluntary payment, and no action would lie to recover the same back. *The Union Bank v. The Mayor, &c. of the City of New York*, 159
2. Nor can such an action be maintained against the city corporation of New York, even if the payment be coercive, taxes being levied and collected under state authority, and the money collected being finally applied by state law. *ib*
3. If an assessment is void as to persons whose property is assessed, their right to maintain an action to restrain the city from collecting it, is clear, not only to avoid a multiplicity of suits, but also to remove a cloud from their respective titles,

created by the lien of the assessment. *Ireland v. The City of Rochester*, 414

### See BOND.

HUSBAND AND WIFE, 8.  
MEANE PROFITS.  
MUNICIPAL CORPORATIONS, 6.  
PARTITION, 7.  
PROMISSORY NOTES, 7.  
SLANDER, 1, 2, 8, 10, 11, 12.

### ADVANCEMENT.

"Advancement" and "advancements," are the terms used in the law dictionaries, and in our statutes, to designate money, or property, given by a father to his children, as a portion of his estate, and to be taken into account in the final partition or distribution thereof. "Advances," is not the appropriate term for money or property thus furnished. The latter phrase, in legal parlance, has a different and far broader signification. It may characterize a loan, or a gift, or money advanced to be repaid conditionally. *Per* JOHNSON, J. *Chase v. Ewing*, 597

See WILL, 6.

### ADVANCES.

See ADVANCEMENT.  
WILL, 6.

### AFFIDAVIT.

The objection that an affidavit was sworn to before a commissioner in

another state, but no certificate of the secretary of state has been obtained as required by the statute of that state, is not fatal. The omission may be amended and supplied. *Lawton v. Kiel*, 80

*See* ATTACHMENT, 3, 4.

### AGREEMENT.

1. Where there is nothing in the body of a written agreement, or in the form of a party's signature, to indicate that the obligation thereby created was intended to be any other than a personal obligation on his part, parol evidence is inadmissible to show that the agreement was in fact the obligation of third persons, and that such party signed it as their agent. *Babbett v. Young*, 466

2. *It seems* the rule is otherwise where it appears in the body of the instrument, or from the signature of a party thereto, that he was acting for others and intended to bind them, and not himself. *ib*

3. D. wanting work, applied to S. to furnish employment; whereupon it was agreed between them that D. should cut timber from his own land, and make it into railroad ties for S. and deliver the ties at twelve cents apiece; that S. should furnish money as the work progressed, and the ties were to be his property from the time the trees were cut from the stump. Under this contract the timber for the ties was all cut, and hauled upon the land of a third person, and was there verbally turned out to S. as his property, before being levied on as the property of D. *Held*, that the contract was not within the statute of frauds, but belonged to that other class of contracts where the vendor agrees to furnish materials and manufacture for, and deliver to, the vendee, certain goods at a future day. That in this case the labor was manifestly to be done for S. upon his employment, and the referee, therefore, rightfully held that the timber became the property of S. as soon as it was severed from the stump. *Stephens v. Santos*, 532

4. The true criterion, in all such cases, is whether the work and labor, re-

quired in order to prepare the subject matter of the contract for delivery, is to be done for the vendor himself, or for the vendee. If for the latter, it is simply a case of hiring, and not within the statute of frauds. *ib*

*See* TOWING.

### ALIENS.

*See* EJECTMENT, 6.  
PULTENEY ESTATE.

### ALIMONY.

*See* MARRIAGE.

### AMENDMENT.

1. In an action, on a promissory note, an amendment of the complaint by inserting therein a count for goods sold and delivered, which formed the consideration of the note, was allowed, on the trial. *Held*, that as the amendment was in furtherance of justice, and did not change, substantially, the claim of the plaintiff, which was an existing indebtedness for property sold and delivered, and it only operated to conform the pleading to a state of facts which the evidence had already disclosed might possibly exist, it was clearly authorized. *E. D. Smith, J. dissented. Vibbard v. Roderick*, 616

2. *Held also*, that the court having the power to grant the amendment, the terms upon which it should be allowed were wholly discretionary, and were not subject to review upon exception. *ib*

### APPEAL.

1. Points not raised on the trial cannot be urged on appeal, for the first time. *Emerson v. Booth*, 40

2. From an order to show cause, granted *ex parte*, returnable at a future day, and granting a temporary injunction pending the motion, no appeal will lie to the general term, until a hearing has been had on the original order to show cause,



or on a motion to vacate or modify such order. *Bloodgood v. The Erie Railway Company*, 278

3. Where it does not appear that at the trial the defendant insisted upon a juror sitting, or took any exception to his exclusion, it is too late to raise an objection, or take exception, upon appeal. *Voorhees v. Dorr*, 580

4. If no request is made, on the trial, that a matter be submitted to the jury, as a question of fact, the objection that it was not submitted, cannot be taken on appeal. *Clinton v. The Hope Insurance Company*, 647

#### APPORTIONMENT.

See EJECTMENT, 10, 11, 12.

#### ARREST.

1. An arrest of a person within this state, by a private individual, without warrant, made for the purpose of forcibly abducting the arrested person from the state, and followed immediately by such abduction, cannot be justified. Such seizure and abduction, of themselves, constitute a criminal offense of high grade, both at common law and by statute. *Mandeville v. Guernsey*, 99

2. One who has arrested another without process, or on void process, wrongfully, cannot detain him on valid process, until he has first restored such party to the condition he was in at the time of his arrest, at least to his liberty. The law will not permit him to perpetrate a wrong for the purpose of executing process, nor to use process for the purpose of continuing an imprisonment commenced without authority and by his wrongful act. *Per J. C. SMITH, J.* 5

See CRIMINAL LAW.

#### ASSESSMENTS.

1. The provisions of the act of April 17, 1858, (*Laws of 1858, ch. 388*), are only intended to relieve against fraud, or legal irregularity, in the

proceedings relative to an assessment, or the proceedings to collect the same. *Matter of the petition of Lewis*, 82

2. The act does not authorize any inquiry whether the work has been well done; or whether the contract has been fully performed; or whether the materials used are according to the specifications; or whether the common council had all the surveys and certificates of inspectors, as required by the ordinances. 5

3. These matters belonged to the common council, as the law was formerly, and now to the board of review; and do not come within the purview of this statute, except in cases where fraud is alleged to have been committed. 5

4. The common council of New York has power, under sections 175 and 176 of the act of 1818, (2 R. L. p. 407,) to assess the expense of repairing or repaving a street upon the property. The subsequent authority to the common council to repair the streets and employ persons therefor, in sections 193, 194 and 195, does not prevent the charging the expense thereof to the owner. Even if it did, it would not apply to a case of an entirely new pavement, after raising and altering the grade. 5

5. The question whether the ordinance of the corporation, passed in 1824, by which it was agreed that the streets should be kept in repair at the public expense, after they are once paved at the expense of the owners, prevents any such assessment, does not come within the provisions of the act of 1858. 5

6. If the corporation has not the power, the want of it is not an irregularity in the proceedings in making the assessment, nor in collecting it. If the common council have made a contract with the owner which they seek to violate, the remedy is not under the act of 1858. 5

7. The ordinance of 1824 applies only to streets paved after its passage. 5

8. The unanimous consent required to make an ordinance passed by both

boards of the common council of New York, on the same day, valid, is the consent of all the members present at the time of its passage. If this appears from the fact that no objection was made at the time, and that all the members present voted for the ordinance, it is valid. *ib*

9. The provision of law that no contract for any public improvement shall be entered into, before an appropriation has been made therefor, (*Laws of 1857, ch. 446*.) does not apply to cases where the expense is charged upon the owners, and not upon the public treasury. *ib*

10. Assessors should not include any charge for making an assessment for repaving a street. The allowance of two and a half per cent for making the assessment is no longer a legal charge. *ib*

11. Where the contract and specifications for paving an avenue did not provide for taking up the gutter stones and paying in their place, but on the contrary, required the contractor to readjust the gutter stones wherever necessary, without charge, and in violation of this he removed the gutter stones and substituted the pavement with the assent of the water purveyor, at the request of some of the owners; *Held*, that there was no authority for this, and it was outside of the contract. *Matter of the petition of Wood*, 275

12. It is erroneous for assessors to include in their assessment a charge for making the assessment. *ib*

13. It is irregular and erroneous for the commissioners of the Croton Water Board to certify the work to have been completed and accepted, when they have rejected the whole street for a distance of one block. The taking a bond to do the work, and withholding a part of the money will not obviate the difficulty. *ib*

14. Although the court does not, in a proceeding under the act of 1858, (*Laws of 1858, ch. 338*.) inquire whether the work was well done, or done according to the contract, so far as relates to the material or workmanship, yet when it appears that

the certificate was given with a full knowledge that the work was not finished, it is a violation of the contract which prohibits the contractor from receiving payment until the whole work is completed, and is unjust to the owners who are assessed for its payment. *ib*

*See ACTION, 3.*

MUNICIPAL CORPORATIONS.  
TAXES AND TAXATION.

### ASSIGNMENT.

*See LEASE, 1.*

### ATTACHMENT,

1. Under the Code of Procedure, the only requisites for the issuing of an attachment are that the action should be for the recovery of money; that the same should be on contract; that the plaintiff should specify the amount of the claim, and the grounds of the demand; and that the defendants should be non-resident debtors. *Lawton v. Kiel*, 30
2. A claim for damages arising upon the breach of a contract by the defendant to purchase sound corn for the plaintiffs, the breach complained of being that the corn was not sound, but heated, sour and unmerchantable, arises on contract, and the amount claimed is a fixed amount, being the difference between the amount paid and the amount at which the grain was sold. *ib*
3. An allegation, in the affidavit, that the defendants have property in this state, is not necessary to the issuing of an attachment. *ib*
4. It is not necessary that the affidavit should show the issuing of the summons. It is sufficient if the summons is issued, when the attachment is obtained, and if both are delivered to the sheriff together. *ib*
5. If the facts are sufficient, a warrant of attachment is not void for omitting to state one of them—as that the cause of action is in an action then pending. *ib*

*See SHERIFF, 2.*

ATTORNEYS.

*See* MAINTENANCE.

B

BAILEE.

*See* CONVERSION, 1.

BANKS AND BANKING.

1. The defendants' bank, having on the first day of July, 1868, paid out to the plaintiff's agent a counterfeit bill, purporting to be issued by the Waterbury Bank, of Connecticut, and the agent having neglected to return it for redemption until the 17th day of September following; *Held* that if the duty rested upon the plaintiff to return the bill and notify the bank of the forgery, within a reasonable time after its discovery, the question of negligence, under the circumstances of this case, was for the jury to decide. *Burrill v. The Watertown Bank*, 105
2. Where the plaintiff was in doubt, and had no ready means of detecting the forgery; *Held* that the duty of returning the bill immediately was not absolute, although its genuineness had been questioned; and that the duty of returning forged paper, in such a case, must begin, if at all, from the time the holder has what the jury shall deem satisfactory evidence of its spuriousness. *ib*
3. The plaintiff's agent having paid out the bill to a third person, supposing it to be genuine, and such third person having neglected for an unreasonable time, after being informed that it was counterfeit, to return it to the agent; *Held* that the defendants' bank could not avail itself of such third person's neglect, to defeat the plaintiff's action. *ib*
4. The defendants, being informed by the plaintiff's agent, on the third day of August, that the bill had been questioned and returned to him, but that he had paid it out again, promising to take it back if it should prove to be a counterfeit,

made no answer whatever. *Held* that the jury might find, upon the evidence, that the defendants' bank had acquiesced in this disposition of the bill, and thereby waived an immediate return thereof. *ib*

BARRATRY.

*See* MAINTENANCE.

BILL OF EXCEPTIONS.

*See* COMPLAINT, 5.

BLOOMINGDALE ROAD.

*See* NEW YORK, (CITY OF.)

BONA FIDE HOLDER.

*See* PROMISSORY NOTES, 4, 7.

BOND.

1. The law implies the release and discharge of a right of action, when the creditor voluntarily delivers to his debtor the bond, note or other evidence of his claim. *Beach v. Endress*, 570
2. After the money due upon a bond or undertaking has been paid by the obligors, and receipted in full on the back of the bond by one of the obligees, and the bond delivered up to the obligors for the purpose of being canceled, no action is maintainable thereon, in the absence of any allegation of fraud or mistake. *ib*
3. Even if the payment made does not fulfill, completely, the measure of the obligation, it is perfectly competent for the obligees to waive the right to further performance, and surrender it to be canceled. And it having thus, by the voluntary act of the obligees, become defunct as a subsisting obligation, no subsequent occurrences can revive it in their favor, without the assent of the obligors. Hence, an action cannot be maintained thereon, even assuming that the obligees might have retained the undertaking, for further

indemnity or security, had they so elected. *ib*

4. Where a bond is delivered up, by one of two joint obligees, to be canceled, the assent of his co-obligor will be presumed, if he makes no objection and takes no steps in a contrary direction till after the lapse of several years. Besides, the act of his joint obligee is binding upon him, and his assent need not be shown. *ib*

### BROKER.

1. An agent employed to sell goods on commission, is a mere broker. As such he is authorized to make contracts for the sale and delivery of the goods, but is not authorized to make such contracts in his own name; nor to receive payment for the property so sold. *Dunn v. Wright*, 244
2. Where goods thus sold by a broker are not entrusted to the possession of the latter, but are sent by the seller to the purchaser directly, with a bill or invoice thereof, and the purchaser receives the goods, with notice that the broker does not own them, and has no right to receive payment for them, he cannot set off a debt due to him from the broker, against the claim of the seller for the price. *ib*

## C

### CARRIER.

See EXPRESS COMPANIES, 1, 2.  
TOWING.

VENDOR AND PURCHASER, 5, 6, 7.  
WAREHOUSEMAN.

### CASES QUESTIONED, COMMENTED ON, &c.

1. The decision in *Thomas v. Todd*, (6 *Hill*, 840,) requiring a creditor who takes forged bank paper in payment of his debt, to return or offer to return it to his debtor, before he can maintain an action upon his original demand, questioned. *Per MORGAN, J. Burrill v. The Watertown Bank*, 105

2. The case of *Erben v. Lorillard*, (19 *N. Y. Rep.* 239,) distinguished from the present. *Mandeville v. Guernsey*, 100

8. The case of *Rigney v. Smith*, (89 *Barb.* 383,) commented upon and limited. *Garlinghouse v. Whitwell*, 208

4. The case of *Reed v. Randall*, (29 *N. Y. Rep.* 858,) criticised. *Per MORGAN, J. Woodruff v. Peterson*, 252

### CLAIM AND DELIVERY.

1. Where the plaintiff in an action for the claim and delivery of personal property, dies after the execution of an undertaking to him by the defendant for the purpose of regaining possession of the property, and before the trial, and another person is substituted in his place, as plaintiff, the person so substituted is the party entitled to recover, and as such, the undertaking takes effect in his favor as the plaintiff entitled to a return of the property. *Emerson v. Booth*, 40
2. The defendant's liability becomes fixed, on the recovery of a judgment by the plaintiff, either to return to the plaintiff the property, or to pay the value of the property to the extent of the penalty. *ib*
8. In an action upon an undertaking given by the defendants in an action for the claim and delivery of personal property, judgment may be rendered for the penalty of the undertaking and interest thereon from the date of the judgment. *ib*

### COMMISSION.

See PRACTICE.

### COMPLAINT.

1. The complaint in an action for deceit or fraud in the purchase or sale of property, induced or procured by false representations, must in substance state the representations, and aver their falsity and that they were made with intent to deceive the plaintiff and induce him to make the purchase or trade in question,

and that they did induce such trade, to the plaintiff's injury. *Barber v. Morgan*, 116

2. Where, in such an action, there was nothing in the first count of the complaint which amounted to an allegation or averment that the defendant made the representations to induce the plaintiff to make the purchase of the property, or with intent to defraud or deceive him; or that such representations in fact induced the purchase of the property; *Held*, on demurrer, that the count was defective, in these particulars. *ib*

3. The second count of the complaint alleged that the defendant represented to the plaintiff that a company, known as "The New York and Santa Fe Mining Company," was a duly organized corporation with an original capital stock of \$5,000,000, of the par value of \$100 per share; that said company had very valuable mines which it was then working; that the yield of its mines was of immense value; and that said company would certainly pay quarterly dividends, in gold, of six per cent; and that the stock of the company was very hard and almost impossible to be obtained, it was so valuable. The complaint then alleged that the defendant affirming and declaring that he knew each and every one of such statements to be facts, induced and advised the plaintiff to purchase of and through him four hundred and eighty shares of the capital stock of the said company, which he did purchase, and paid therefor the sum of \$18,376; the plaintiff believing and confiding in each and all of the said statements and representations to be true. The count then averred that each and every of said statements were false and were fully known to the defendant to be false. *Held* that these allegations, together, imputed and implied a fraud purposely and intentionally committed upon the plaintiff, by the defendant, and that the count might therefore be sustained. *ib*

4. *Held, also*, that the plaintiff could not be required to prove, on the trial, anything more than the representations set forth, the fact that the defendant procured and induced

him, in reliance upon such representations, to make the purchase of the stock as stated, and then to prove the utter falsity of such statements and representations, and that the defendant knew them to be false when he made them. That this would make out a clear and complete cause of action, except proof of damages. *ib*

5. No question can arise upon a bill of exceptions, as to the sufficiency of the complaint, where testimony offered by the plaintiff is received without objection, and the defendant's counsel does not suggest that the complaint is insufficient, until after the plaintiff has proved his case and rested. *Kern v. Toussley*, 885

6. At that stage of the trial, the defendant may raise the question as to the sufficiency of the complaint, by a motion to strike out so much of the testimony as tends to prove matters not alleged in the complaint. *ib*

7. Defects in the complaint may be stated as a ground for a motion for a nonsuit; but if the testimony given without objection is sufficient to establish a cause of action, the motion should be denied. *ib*

#### CONSTITUTIONAL LAW.

1. The act of the legislature, of April 24, 1865, entitled "An act to provide for the laying out and improving of certain portions of the city and county of New York," is not in conflict with the second section of the 10th article of the constitution of this state, because the power to make the application therein authorized, which by the act is vested in the Commissioners of the Central Park, should have been given to the common council of the city. *Matter of the application of the Commissioners of the Central Park*, 277

2. The authority conferred on the commissioners is not that of any local officer, nor does it authorize them to discharge the duties of any officer, but it provides for the discharge of a more ministerial act, viz. presenting to the court a petition for the

- opening of a street. It is a mere authority to make an application to the court for the opening of a street; and that power may be conferred on the Commissioners of the Central Park. *ib*
3. The right to grade streets in the city of New York having always been exercised by the common council, as well as other powers conferred by that act on the commissioners, it may well be doubted whether the legislature can take from the common council this power and confer it on state officers. *Per INGRAHAM, J.* *ib*
  4. The legislature may lay out a road or drive by statute; and having that power, it may authorize others to do it. *ib*
  5. No such road or drive could be laid out without the authority of the legislature; and whenever it has been necessary to open any new street or avenue not laid down on the map, such legislation has been deemed necessary, and the limits of the street or avenue have been fixed by the statute. *Per INGRAHAM, J.* *ib*
  6. Several instances specified in which such acts have been passed, without any action of the common council, where proceedings have been taken by other parties than the common council. *ib*
  7. The legislature of this state has no power to confer upon towns authority, absolute or conditional, to issue bonds and *donate* the proceeds to a private corporation. *Matter of the application of Sweet v. Hulbert*, 812
  8. Though it were conceded that the legislature has the power to *enable* towns to subscribe for stock in a railroad corporation and issue bonds to pay for the same, it would not follow that it might pass laws enabling towns to issue bonds and *donate* the proceeds, or if it did pass such laws, that any bonds issued or other act done under that authority would be valid against the town. *Per JAMES, J.* *ib*
  9. The act of the legislature of this state entitled "An act to authorize the town of Saratoga, in the county of Saratoga, to issue bonds to aid in the construction of a railroad from the village of Mechanicville to intersect the Glens Falls Railroad," passed April 27, 1868, (*Laws of 1868, ch. 884*.) is unconstitutional and void. *ib*
  10. That act does not assume to take the money of the tax payers by due process of law, nor in virtue of the right of eminent domain; and it does not come within the legitimate scope and purpose of the taxing power of the government. It, therefore, follows that in passing said act, the legislature exceeded its powers; that the act was unauthorized; and is without validity or force. *ib*
  11. The property of the citizen cannot be taken from him without his consent, except by due process of law, or by eminent domain, or by taxation. Against every other mode he is protected. *ib*
- See MUNICIPAL CORPORATIONS, 17, 23.  
ROCHESTER (CITY OF,) 5, 6, 7.  
VENDOR AND PURCHASER, 11.
- ### CONVERSION.
1. Where a bailee of goods absolutely refuses to deliver them to the owner on demand; or denies his right to them; or assumes to be himself the owner; or interposes an unreasonable objection to delivering them; or exhibits bad faith in regard to the transaction; a conversion of the property may be inferred. *Carroll v. Mix*, 212
  2. But where the defendant received goods from B. without knowing who was the owner, but having every reason to suppose B. to be the owner, and, on demand being made by a third person claiming to be the owner, did not set up any claim to them, nor dispute the claimant's right, but stated, in substance, that he did not know the claimant was the owner; that the property was left by B. and that he desired the order of his father, or B. before delivering the same; or an opportunity to confer with his father in regard thereto; *Held*, that this was not such a refusal as amounted to a conversion of the goods. *ib*

CORPORATIONS.

1. However objectionable the issue of stock dividends by a corporation, may appear to be, as bearing upon the value of the stock, such considerations are more properly to be addressed to the board of directors than to the court, on a motion to continue an injunction. *Howell v. Chicago and Northwestern Railway Company*, 878
2. Under ordinary circumstances, where a corporation has earned a dividend, and it desires to retain the moneys so earned, for the purposes of the company, either in making improvements on its property or for the payment of its debts, it would be no violation of law to retain such moneys and in lieu thereof to issue to the stockholders a corresponding amount of stock. *ib*
3. The election to do either rests with the board of directors, and if the company has the power to increase the capital stock, for any purpose, either mode of making such increase is not a violation of law, and affords no ground for an injunction to restrain them. *ib*
4. If a corporation has the power to increase its capital, it is immaterial whether such increase is made by awarding the stock to stockholders as dividends, in lieu of money, retaining the money for the purposes of the company, or by paying the stockholders the dividends in cash from the earnings of the company and selling the stock in the market, to raise money for the use of the corporation. *ib*
5. It may be doubted whether a statement, made by a board of directors, in a report, avowing their determination not to make any further increase of the capital stock, would be sufficient to warrant the restraining of the company from doing an act expressly authorized by statute; or even if it had such an effect, as to the board by which it was made, whether any subsequent board could thus be deprived of the powers conferred upon it by law. *Per Ingraham, J.* *ib*

*See FOREIGN CORPORATIONS.  
RAILROAD COMPANIES.*

COSTS.

*See EJECTMENT, 6.*

COUNTER-CLAIM.

Where a party sued upon an agreement executed by him in his own name, does not claim, upon the trial, to recoup any damages except such as have accrued to third persons, by the plaintiff's alleged breach of the agreement, and they are not shown to be parties to the agreement, an offer to prove a counter-claim in their behalf, is properly overruled. *Babbett v. Young*, 466

COUNTERFEIT NOTES.

*See BANKS AND BANKING.*

CRIMINAL LAW.

1. A criminal warrant should contain a command, or a requirement in the nature thereof, to the person to whom the warrant is directed, to make the arrest. A mere authority, in the nature of a license or permission to make the arrest would not be a warrant, within the statute, or at common law. *Abbott v. Booth*, 546
2. The direction is an essential part of every warrant. Unless it is directed to the sheriff, or the constables of the county, or town, or some individual officer or to some individual by name, who is not an officer, it is not a proper or sufficient warrant. *ib*
3. At common law, a warrant might be directed to some indifferent person who was not an officer; and this may still be done; but the practice should not be resorted to if an officer can conveniently be found. *ib*
4. But where the warrant is directed, in the body thereof, "to the sheriff or any constable of the county," in which the magistrate resides, an authority cannot be conferred upon a person who is not an officer, to execute the same, by an indorsement on the back thereof, signed by the justice, "authorizing and empowering"

such person to arrest the defendant and bring him before the justice. Such an indorsement is not a direction to the person named therein; and the warrant will afford no justification to him for an arrest made under it. b

## D

### DAMAGES.

1. In an action to recover damages for injuries done to the plaintiff's premises by water, in consequence of the diversion of a stream from its channel by the defendants, in constructing a culvert, the legal rule of damages has no reference to the cost of removing a bar of gravel carried there by the flood. The measure of damages in that class of cases is the depreciation in the value of the plaintiff's premises occasioned by the injury resulting from the defendants' acts. *Easterbrook v. The Erie Railway Company*, 94
2. In a case where the deposit is comparatively extensive, and the cost of removing it would probably equal, if not greatly exceed, the value of the soil covered by it, the rule contemplates that the material deposited by the flood is to remain upon the land; and one of the items of damage is the depreciation in the value of the land in consequence of its remaining. b
3. The owner of the land is therefore under no obligation to remove the gravel so deposited thereon, by reason of his having received compensation for his damages, from the wrongdoer; nor does he incur any peril, in a legal sense, by suffering it to remain. b
4. Hence his neglect to remove such gravel bar will not preclude an action by him for damages done by a subsequent flood, in consequence of the improper and unskillful location and construction of the culvert, by the defendants; although such gravel bar may have had some effect in deflecting the course of the flood. The case will be the same, in that respect, as if the flood had been thus diverted

by the natural formation of the surface of the plaintiff's land, or as if the bar had been deposited there before the culvert was made. b

### DECEIT.

*See* COMPLAINT, 1, 2.

### DECLARATIONS.

1. In an action by the executor of a mortgagee, to foreclose a mortgage, the plaintiff cannot be allowed to give in evidence the declarations of the testator, for the purpose of proving that the indebtedness secured by the mortgage was a loan and not an advancement to his children, or one of them. *Chase v. Ewing*, 597
2. And inasmuch as, had the action been brought by the testator in his lifetime, his parol admissions, or declarations, that the money had been furnished by way of advancement, and not as a loan, would have been inadmissible, on the ground that they would contradict the plain terms and legal intentment of the mortgage; *Held*, that they were equally inadmissible in an action of foreclosure brought by his executor. b
3. Conversations and declarations of a testator, in favor of the executor are never allowable in actions between the executor and third persons, unless under some peculiar circumstances. b

### DEDICATION.

1. Section 27 of the act of 1813, "to regulate highways," (2 R. L. p. 277, c. 83,) adopted in the revision of 1830, (1 R. S. 520, § 99,) which provides that a street must be opened and worked within six years from the time of its being laid out, to make it a highway, has no relation to highways dedicated by the owners themselves to the use of the public, but was intended to apply exclusively to those laid out by the proceedings authorized by the act, in which lands could be taken without the owner's consent. *McMannis v. Butler*, 436



2. Where the evidence of a dedication of land by the owners, for a street, consists of clear, unequivocal and decisive acts of such owners, amounting to an explicit manifestation of their will to make a permanent abandonment and dedication of the land, which of themselves are sufficient to establish a dedication, without any intermediate period, if the land dedicated is unequivocally used and occupied for any continuous period of time, by the public at large, that will amount to an adoption of the dedication. But the user, in such a case, ought to be for such a length of time that the public accommodation, and private rights, might be affected by a revocation. *ib*
3. The proprietors of a tract of land caused the same to be surveyed, in December, 1826, and a map thereof to be made, laying out the same into village lots and streets, including certain land designated thereon as Burns street; which map was signed by them and recorded in the county clerk's office, in September, 1827. There was evidence tending to show a continuous use of Burns street as a public highway, from 1832 to 1865. Most of the travel proved was confined to that portion of the street which was necessary for transit from a street on the east to another on the west side of Burns street, yet for that purpose the line of travel was not directly across the latter street, but it was necessary to turn into that street and go along it a distance of from twenty-five to seventy feet, before turning into either of such other streets. For aught that appeared, Burns street was open its whole length as mapped, and the testimony tended to show that for some distance it was fenced. In 1858, I. claiming title to the premises, erected a house thereon. Such house did not block up the street, but merely encroached upon it, and the travel went on, as before. *Held* that under these circumstances the jury were justified in finding an acceptance of the dedication, by public user. *ib*
4. In 1858 the common council of Rochester, in which city Burns street was situated, caused the obstructions that had been placed in the street by I. and those claiming under him to be removed, with their consent, and

the street to be improved; since which time it had been used as a street, until the plaintiff put up a fence on it; which the defendants tore down. I. was told, when he put up the house, that it was on the street. He admitted that it was, and said that if the street was ever improved, the house would have to be removed; and he set it on blocks, and made no cellar under it. *Held* that the action of the city authorities, in 1858, was a clear acceptance of the dedication, even if the previous user was not. *ib*

5. *Held, also*, that the question of revocation by I. of the dedication was one of fact, depending on the circumstances of the case; and that the jury were authorized to find, upon the testimony, that his acts were not intended by him as a revocation, and did not amount to it. *ib*
6. *Held, further*, that I. could not revoke the dedication unless he had succeeded to the title of the original proprietors. *ib*
7. Where the grantee in a quit-claim deed acquires, thereby, only an undivided portion of the interest of the original proprietors in land previously dedicated as a street, and his deed refers to the map on which such land was so dedicated, it may well be questioned whether the grant to him is of any thing more than the fee subject to the public easement. *Per J. C. SMITH, J.* *ib*
8. Whether the owner of an undivided portion of the estate can revoke a dedication made by the owners of the whole, prior to the grant to him. *Quere.* *ib*

## DEED.

*See* DEDICATION, 7.

## DISSEISOR AND DISSEISEE.

*See* MERE PROFITS.

## DIVORCE.

*See* MARRIAGE.

## DUTIES.

See VENDOR AND PURCHASER 9 10, 11.

## E

## EJECTMENT.

1. In an action of ejectment, brought by a vendor, or his grantee, to recover lands in the possession of the defendant under an executory contract of sale, for default in the payment of one of the installments at the time fixed upon by the contract; *Held*, that the defendant might interpose an equitable defense, and the court would consider the case in the same view as though the defendant had commenced a cross action and applied for an injunction. *Cythe v. LaFontaine*, 186
2. The decision of such a question consists of a single conclusion of law, and a general exception is sufficient. *ib*
3. When the grounds of defense may be clearly understood by the answer, and the parties go to trial and actually try the very question on which their rights depend, objections to the answer on account of a defective statement of facts will be disregarded on appeal. *ib*
4. Where the plaintiff had taken a conveyance of the lands, and an assignment of the contract, with notice of the purchaser's equity; *Held*, that he was in no better position to enforce a forfeiture than his assignor. *ib*
5. An action of ejectment by the vendor to recover possession for default in payment of the purchase money, being a legal action, as defined by the Code, the defendant, if he succeeds, is entitled to costs, although in an equitable action for the same relief he might be charged with costs. *ib*
6. Where it is proved, in an action of ejectment brought by the people, that an individual under whom the defendant claims title, was not an alien, but a naturalized citizen, both at the time of the grant to him and of his grant to the defendant's gran-
- tor, the people, in their sovereign capacity, should be presumed to have known that fact; especially where it appears that such person had represented, and exercised, their sovereignty, both in the legislative and judicial departments of the government for a number of years. *The People v. Snyder*, 889
7. Where, in an action of ejectment brought by the people, it was admitted by the pleadings that a third person held the title of the premises, in 1792, and that consequently it was then out of the plaintiffs, if they had ever been invested with it; *Held* that the mere fact that the lands in question were at the time of commencing the action unoccupied and uncultivated, raised no presumption whatever that the plaintiffs had become re-invested with such title. *ib*
8. The presumption in such a case is, that the title remains out of the plaintiffs, until the contrary is shown, affirmatively. The burden of proving reinvestment is on the plaintiffs. The fact that the land is wild, and not actually occupied by any one, works no forfeiture of title, and no escheat. Nor does it raise any presumption in the people's favor, where they are shown to have been once divested. *ib*
9. In an action of ejectment, brought by the people, the plaintiffs cannot recover upon the ground that the Indian title to the lands in question has never been extinguished; where it is not pretended that the state has ever acquired the Indian title, by any purchase or treaty, but on the contrary, it is claimed that the fee of such lands is still in the six nations of Indians. *ib*
10. Although a rent charge cannot be apportioned by the act of the parties, it may be by force of the law. The descent of lands from ancestor to heirs is a transfer of title by operation of law. The heirs take and hold such inheritance as tenants in common. Each of such tenants may pursue his remedies independent of the other. *Cruger v. McCloughry*, 642
11. The owner of lands conveyed the same to the defendant's grantor, sub-

ject to an annual rent charge thereon, and the right of re-entry in case of non-payment of rent. The grantor died, leaving six heirs. *Held*, that one of such heirs could maintain an action of ejectment, to recover possession of her one sixth of the lands, as such heir, for non-payment of rent, without joining the owners of the other five sixths as plaintiffs. *ib*

12. Whether the defendant, in such an action is bound to insist upon the non-joinder of the other owners as parties plaintiffs, by demurrer, or can take the objection by answer, although the defect appears in the complaint? *Quere.* *ib*

*See MESNE PROFITS.*

**ESTOPPEL.**

1. A party who claims that another, seeking to enforce his rights, shall not be permitted to allege and show the truth, must establish that he had been induced, by his faith in, or reliance upon, the assertions or acts of such party to the contrary, to do some act, or incur some liability, which would make it injurious to, or a fraud upon, him to allow such truth to be shown. *Garlinghouse v. Whitwell*, 208
2. A party setting up an estoppel, must be personally misled or deceived by the facts which constitute the estoppel alleged; and he must have a particular interest in such acts, more than the public at large. He must have trusted to them, and confided in them, in some particular business transaction. *ib*
3. Nothing in the mode of conducting the business in a store—such as the name over the door, and on the window shades, newspaper advertisements, &c.—can operate as an estoppel, in respect to the ownership of the business and goods, as between a person claiming to be the owner and the plaintiff in a judgment recovered against a third person, before the commencement of the business in such store, or the sheriff, acting as the agent of such plaintiff, under an execution. The mode of carrying on a subsequent business cannot have influenced the giving of a previous credit. *ib*
4. R. and T. being adjoining owners of land, T. called upon R. in reference to building a line fence. R. being a cripple, unable to leave his house, and not knowing where the boundary line between them was, sent T. to B. to have the latter point out the line, saying that B. knew where the line was. B. accordingly pointed out the line to T. who built a fence there, and from year to year improved his land up to the fence. The evidence showed that R. never knew where the line had been pointed out or located, nor what T. had done in the way of fencing and improving the land. It turned out that B. did not know where the line in fact was, and pointed out the wrong line. *Held* that upon these facts the elements necessary to create an estoppel *in pais* were entirely wanting. *Raynor v. Timerson*, 517
5. *Held, also*, that T. was as much bound as R. to know where the true line was, between the two lots, and that B. was as much the agent of T. as of R. *ib*
6. *Held, further*, that as it did not appear from the case that there was any difficulty in ascertaining the true line, by survey and measurement, it was not a case where the line was uncertain, and difficult to discover, but a case where T. instead of taking any steps to ascertain, chose to take the word of B. and thus, by the mistake of the latter, an erroneous line was located and the division fence built upon it. *ib*
7. That R. not knowing where the location was made, nor that T. was making improvements upon the land on his side of the line fence, he was not called upon to speak, or to give notice; and his silence, under the circumstances, implied no acquiescence in T.'s proceedings, and no wrong. *ib*
8. There is no case to be found where an erroneous boundary line, established under such circumstances, has been held binding and conclusive on the ground of estoppel *in*

*pos*, short of twenty years' possession under claim of title. *Per* JOHNSON, J. ib

9. The mere circumstance that one has made improvements upon the land of another, under an honest, but erroneous belief that he was the owner, forms no ground for transferring the title of one person to another; nor for estopping the owner from reclaiming his own. *Per* JOHNSON J. ib

*See* PARTNERSHIP, 2.  
POSSESSION.

EVIDENCE.

1. *Generally.*

1. It is indispensable to the admission in evidence of a memorandum made by a witness at the time of the making of an alleged agreement, that it be shown the witness has no recollection of the matters stated therein, independent of the written paper. If he has such recollection, the evidence is inadmissible. *Mosham v. Pell*, 65
2. Where a witness testifies fully to an interview between the parties, at which an agreement was entered into, a memorandum of the terms of such agreement, made by him at the time, is not admissible to corroborate the witness. ib
3. A party to an action should not be permitted to give in evidence a memorandum made by *himself*, to prove the terms of a contract between him and his adversary, which has been made by him privately, and never shown to the other party. Such a rule of evidence would open a door to frauds of the worst character. *Per* INGRAHAM, J. ib
4. Where improper evidence is received although objected to by the other party, but subsequently and before the testimony is closed, the judge orders the evidence to be struck out, and directs the jury to disregard it, the error is not cured by such order and direction if the verdict cannot be supported except by such evidence. *Mandoville v. Guernsey*, 99

5. But where, upon the questions of fact submitted to the jury being found in the plaintiff's favor, he is entitled to recover some amount of damages, and the jury find a verdict in his favor which, under the circumstances shown by unobjectionable testimony cannot be regarded as excessive, it being clear that the jury, in forming their verdict, may have wholly disregarded the evidence objected to, as they were directed to do, and as was their duty to do, it will be presumed that they acted in accordance with their duty, and that their verdict was based solely upon the evidence properly before them, and by which it was warranted. ib

6. Where a memorandum, made by a witness in his memorandum book, of what took place at an interview was made on the evening of the day on which the interview occurred, and corroborates the evidence given by the witness, on the trial, it may be received and relied upon for that purpose. *The Townsend Manufacturing Company v. Foster*, 346

7. The just administration of the laws requires that where there is a decided preponderance of evidence upon one side, that should always be followed, where the witnesses on both sides are equally candid, intelligent and positive in their statements. ib

8. Where the preponderance in the evidence is so decided as to lead very naturally to the conclusion that injustice has been done to a party, by the judgment recovered against him, the judgment, under the well settled rule applicable to such cases, should be set aside, and a new trial directed. ib

9. Whenever there is good reason for believing that a referee has mistaken the import and preponderance of the evidence given on the trial, and it is evident that injustice has been done, the judgment entered upon his report should be set aside. ib

10. The rule that no evidence is admissible which does not tend to prove or disprove the issue joined, excludes all evidence of collateral facts, or those which are incapable of affect-

ing any reasonable presumption or inference as to the principal fact or matter in dispute. *ib*

11. Where the issue to be tried was, whether the defendants agreed to store, insure and sell the plaintiff's goods for a commission of five per cent; *Held* that evidence offered, to prove that broker's rates of commissions at the time and place in question, were from five to seven per cent, without including either storage or insurance, was properly excluded. *ib*

*See* DECLARATIONS.

2. *Parol, when admissible.*

12. Where a witness states that a letter is lost and he cannot tell what has become of it, that is sufficient evidence, *prima facie*, of loss, to admit parol evidence of its contents; where the witness is not cross-examined for the purpose of ascertaining where he kept his letters, or whether he preserved them at all, or what search he has made; but the objection is that there is no evidence that it has been destroyed, or that the witness has searched for it where he usually keeps his letters. *Voorhees v. Dorr*, 580

*See* AGREEMENT. 1, 2.

JUSTICE OF THE PEACE, 7.

EXCEPTIONS.

*See* PRACTICE.

EXPRESS COMPANIES.

1. An express company is to be regarded as a common carrier, and its responsibility for the safe delivery of property entrusted to it, is the same as that of a carrier. It cannot by a notice, or by an exception in a receipt, which is not shown to have come to the knowledge of the shipper or holder, exempt itself from liability in whole or in part, if goods are lost through its negligence. *Belger v. Dinanore*, 69
2. Nor will proof, even, that such notice was brought to the knowledge of the owner, be sufficient to relieve the carrier's liability; but an express contract must be proven. *ib*

3. In an action against an express company, to recover the value of a trunk and its contents, which it had undertaken to transport, which were lost while in its care, the defendant gave in evidence a receipt, given at the time of receiving the trunk, in which the liability of the company was limited to the sum of \$50. There was no evidence, on the trial, that knowledge of the contents of the receipt ever came to or was brought home to the plaintiff. The justice not only refused to submit to the jury the question whether there was any evidence of a contract between the parties, but held that the receipt was a binding contract between the parties and limited the defendant's liability to \$50 and interest, and directed a verdict for the plaintiff for that amount. *Held* that in this the justice erred. *ib*

*See* STAMPS.

F

FALSE REPRESENTATIONS.

*See* COMPLAINT, 1, 2, 3.

FARMERS' LOAN AND TRUST COMPANY.

*See* INSURANCE, (FIRE,) 2, 3, 4.

FLOOD.

*See* DAMAGES.

FIXTURES.

The more sensible rule, in regard to what are to be deemed fixtures, seems to be that if articles are essential to the use of the realty, have been applied exclusively to use in connection with it, are necessary for that purpose, and without such or similar articles, the realty would cease to be of value, then they may properly be considered as fixtures, and should pass with it. *Hoyle v. Plattsburgh and Montreal Railroad Company*, 45

## FORECLOSURE.

See MORTGAGE.

## FOREIGN CORPORATIONS.

1. Previous to the Code, foreign corporations were not the subject of litigation in the courts of this state, except when proceeded against by attachment of their property for the collection of a debt or the redress of a wrong. And the Code was not intended to extend that power any further than it existed at that time; although the language of the Code is more general, and might be construed more liberally. *Howell v. The Chicago and Northwestern Railway Company*, 378
2. Although it is the duty of the state to provide for the collection of debts from foreign corporations, due to its citizens, and to protect its citizens from fraud, by all the means in its power, whether against domestic or foreign wrongdoers, this does not authorize the courts to regulate the internal affairs of foreign corporations. The courts possess no visitatorial power over them. *ib*
3. The court will not enjoin the directors of a foreign corporation from paying a dividend, where no debt is due to the plaintiff, and he has no claim for redress for any wrong, and his only ground for the injunction is a supposed error on the part of the directors in making the dividend. *ib*
4. For such a cause he must seek redress in the courts of the state where the company was incorporated; unless fraud is contemplated, by which the property of stockholders who are citizens of this state is placed in jeopardy. *ib*
5. Although it be not affirmed that in no cases should the courts exercise jurisdiction; yet even if the power exists to compel a foreign corporation to come into our courts and become a party to litigation here, still, where the cause of action arises abroad; where it affects only the internal government of the corporation; where the judgment, if rendered, cannot be in any way enforced

against them, except by injunction against individual members of the corporation; and the party has an ample remedy in the state where the corporation has a legal existence; the courts here may well decline exercising an equitable jurisdiction, in such a case. *Per INGRAHAM, J. ib*

## FORMER SUIT OR RECOVERY.

1. When a case is tried, and a claim is submitted to the jury or the court, it cannot in another action be litigated. Though the pleadings may present the claim, yet if no testimony is given in support of it, and it is not submitted to the court or jury, it will not be barred, unless it is a claim which the party is bound to present and litigate in that suit, as, in some cases, a set-off, in a justice's court. *Burwell v. Knight*, 267
2. Whether the claim was litigated and submitted is a question which may be proved upon the trial of the second action. If the claim is embraced by the pleadings, specifically, the presumption is that it was submitted and passed upon. But the party alleging the contrary may prove that the claim was not litigated, and not submitted, but that the trial and verdict proceeded upon other grounds. *ib*
3. If the record shows that the claim was not tried and submitted, no other proof is necessary. *ib*
4. Where it appeared from the record put in evidence on the trial that, in a former action between the same parties, the plaintiff in the second action pleaded, by way of defense, the same matter set forth as the ground of the second action, (which matter was proper as a defense,) and that the defendant in that action did not appear upon the trial, and judgment was given upon the testimony of the plaintiff alone; *Held*, that the judgment in the former action did not constitute a bar to the second. *ib*
5. A former decision, in an action between the same parties, upon the merits, so long as it remains unreversed, and not in any manner vacated or annulled, is not only binding,

but is positively conclusive, upon the parties, in a subsequent action between them for the same cause. *The People v. Smith*, 360

6. Neither of them can be at liberty either to allege or prove that the facts put in issue in the previous action, and upon the trial of it adjudged and determined against the plaintiff, were not true. And without such allegation and proof the plaintiff cannot recover in the second action. *ib*

7. Where the decision and judgment contains only a simple direction that the complaint be dismissed, without any express finding of facts required to be negatived in order to warrant a recovery in the second action, it may be that the judgment should not be held to be a bar; but even in a case like that, the case is not free from doubt. *Per DANIELS, J.* *ib*

8. But where the facts themselves are adjudicated and found in the former action, the parties should be estopped by such finding, so far as those facts themselves may be brought in controversy in the second action, and may be essential to the right of recovery therein; the parties, as to such facts, having had their day in court, with a definite decision rendered upon them. *ib*

9. In an action upon a recognizance, taken before a county judge, the plaintiff, on the trial, was unable to prove that the recognizance had been filed in the office of the county clerk, (although such was the fact,) or that it had ever become in any manner a record of the court. The action being tried by the court, without a jury, upon an agreed statement of facts, the court found and decided "that the recognizance was never filed in, or made a record of, any court; that no record of such recognizance had been made, in any court; that to maintain an action upon a recognizance it must appear that it was filed in, or made a record of, the court in which it is returnable; and that the complaint of the plaintiff be dismissed, with costs." The judgment entered upon such decision recited, and stated these findings and conclusions of fact and law, and then adjudged and directed

that the complaint be dismissed, with costs. In a subsequent action, brought by the plaintiff in that suit against the defendant therein, upon the same recognizance; *Held* that the finding, in the previous action, that the recognizance had not been filed, and had not become a record, was conclusive upon the plaintiff, in the second action; and inasmuch as he could not properly recover without establishing the converse of those findings, judgment was properly directed for the defendant. *ib*

*See MERE PROFITS.*

### FRAUD.

*See COMPLAINT, 1, 2, 3.*

### FRAUDS, STATUTE OF.

*See AGREEMENT, 4.*

### G

### GIFT.

1. Where the plaintiff, being the owner of land, gave the same, by parol, to the defendants, and the use thereof, so long as they, or either of them, should live, and the defendants went into possession of the land, and occupied it, made improvements and paid a portion of the taxes thereon; *Held*, that this was a gift so far executed as to entitle the donees to a specific performance of it by the donor. *Freeman v. Freeman*, 806
2. *Held, also*, that the acceptance of the land by the defendants as a gift, and their occupancy of it and their improvements upon it, pursuant to the gift, with the approbation of the donor, rendered the gift irrevocable; it being executed by the parties, except that no deed was delivered. *ib*
3. *Held, further*, that the gift partook of the nature of a contract, and became binding upon the donor as a contract, by a good and valuable consideration moving from the donees; by their changing their place of residence, and spending several

years upon the land when it yielded but very little; and by their making valuable improvements on the land, and paying taxes thereon. *ib*

4. That the donees were, in equity, entitled to a life estate in the premises, and that it would be against conscience to allow the donor to revoke the gift; and that it should be specifically enforced, by a decree directing the execution of a deed by the donor, conveying the premises to the donees, to have and to hold the same so long as they or either of them should live. *ib*

## H

### HOTEL KEEPERS.

Under a statute providing that whenever the proprietor of any hotel, inn, &c. shall provide a safe, for the safe keeping of any money, jewels, &c. belonging to guests, and post a notice thereof in the rooms, and a guest shall neglect to deposit his money, &c. in such safe, the proprietor of the hotel shall not be liable for any loss of such money, &c. sustained by such guest, by theft or otherwise, if after the proprietor of a hotel has furnished a safe and given the required notice thereof, a guest neglects to place his money, &c. in the safe, but keeps them in his own care, such proprietor is not responsible for their loss, to any amount, or for any value; not even for a sufficient amount of money for the guest's ordinary traveling expenses. *Hyatt v. Taylor*, 632

### HUSBAND AND WIFE.

1. When a married woman acts and speaks by her husband, his declarations and acts are hers, and she must see to it—particularly when he assumes to act and speak in her presence, for her—that he speaks and acts as the law and her duty require her to speak and act if she spoke herself. She must, in such case, dissent and disapprove his acts and declarations, or they should be deemed hers. *Lindner v. Sahler*, 322
2. She cannot stand by and hear him assert rights for her, and in her be-

half, or do wrong for her benefit, or refuse to do what her legal duty requires, and escape responsibility. Under such circumstances, if she does not dissent she will be deemed to assent. *ib*

3. Thus, where the plaintiff, having lost certain sheep, went to the defendant's house, and demanded them of her husband, she being present, at the time, with which demand the defendant's husband refused to comply; *Held* that it was a question for the jury whether the defendant's husband refused to deliver the sheep on such demand, by her authority, direction or assent; whether he spoke for his wife, and she knew that he assumed to do so, and assented to what he said, or to his assumption to act and speak for her. And that if she did, the jury might infer a refusal by her; and in that case an action would lie, against her, for a conversion. *ib*

4. A husband who is ready, able and willing to support his wife, and who gives her no just cause or occasion to abandon him or leave his bed and board, cannot be compelled to support her elsewhere than at his own house or home, if he has one, by any private person, or by the town or county; whether she be sane or insane. His liability for necessities provided by other persons, for her support, rests entirely upon the ground of his neglect or default. *Board of Supervisors of Monroe County v. Budlong*, 498

5. The certificate of a county judge, given in pursuance of section 26, of the "Act to organize the State Lunatic Asylum," passed April 7, 1842, (*Laws of 1842*, p. 141,) as the same has been modified by subsequent statutes, is an adjudication *in rem* upon the subject to which it relates, and is, *it seems, prima facie* evidence of the existence of the facts asserted therein, as against all persons notified to attend the hearing and investigation before such judge. *ib*

6. As the statute does not declare what shall be the force or effect of such certificate as evidence, or whom it shall bind, it must stand upon the same basis with all other judgments or adjudications. It must bind those



who were parties and privies to the proceeding, and had an opportunity to litigate the questions involved in such investigation and adjudication. No one else can be bound by it. *ib*

7. If such certificate be *prima facie* evidence of the facts it recites, and affirms or finds, it is not conclusive on a party who has no notice of the proceeding. Such party is entitled to disprove the facts alleged or stated in the certificate upon which the jurisdiction of the judge depended. *ib*

I

INDIAN TITLE.

*See* EJECTMENT. 9.

INFANT.

*See* JUSTICE OF THE PEACE, 1, 2, 3, 4.

INJUNCTION.

*See* FOREIGN CORPORATIONS.  
JURISDICTION, 1, 2.

INN KEEPERS

*See* HOTEL KEEPERS.

INSURANCE (FIRE.)

1. The plaintiffs, as trustees of a railroad company, effected a policy of insurance with the defendants "on any property belonging to the said trust company, as trustees and lessees as aforesaid, and on any property for which they may be liable, it matters not of what the property may consist, nor where it may be, provided the property is on premises owned or occupied by the said trustees, and situate on their railroad premises in the city of Racine, Wisconsin." *Held* that a dredge boat belonging to the plaintiffs, as trustees, in their employ in the city of Racine, and attached to their wharf where the road terminated, was thereby in the plaintiffs' possession, and annexed to the railroad prem-

ises, and therefore covered by the policy. *The Farmers' Loan and Trust Company v. The Harmony Fire and Marine Ins. Co.* 88

2. The act of incorporation of The Farmers' Loan and Trust Company fully authorized the company to accept a conveyance of property from a railroad company, in trust, to secure the payment of an issue of bonds by said railroad company. *ib*
3. Whether such loan and trust company can hold real estate in Wisconsin must depend on the statutes of that state. In the absence of any proof of a law to the contrary, it will be presumed that the company had authority to execute the trusts which by their charter they had power to undertake. *ib*
4. So long as they were allowed to remain in possession and use the railroad property so conveyed to them in trust, they had such an interest as would bring all their property connected therewith, under the terms of the policy. *ib*
5. Where an application and survey is made, by the insured, to accompany a policy of insurance, or is referred to as forming a part of such policy, such application, survey and policy are to be construed together, as parts of one entire contract. *Clinton v. The Hope Insurance Company,* 647
6. Three separate surveys of property had been made, prior to the issuing of the policy in suit, and were on file in the office of the company's agent; the earliest, bearing date in 1860, and the latest in 1863. All of these were signed by persons other than those insured under the policy in suit. All were made under circumstances wholly different from those existing when such policy was issued, in February, 1865, and the persons insured in such policy had no knowledge, when they took the same, of any of the prior applications or surveys, although they knew the property had been insured. The agent, if he had any knowledge of the former applications and surveys, also knew they were so defective and incorrect as to make the policy sued

- on worthless to the insured. *Held*, that, under these circumstances, it was not to be presumed that either party entered into the contract of insurance in question in view of, or subject to, former surveys, the contents of which were either unknown to the parties, or were known to be fatal to the efficiency and validity of the policy issued. *ib*
7. *Held, also*, that the insured were not identified with surveys previously filed by other parties, in such a manner as to estop them from denying that the representations in such surveys were theirs, or that they were responsible therefor. *ib*
  8. Extrinsic evidence may always be adduced to ascertain the interests intended to be insured, and a survey may be had in accordance with such proofs. *ib*
  9. The expression, "Estate of Daniel Ross," in a policy, is indefinite, uncertain, and without any specific legal significance. But its significance may be shown by parol, or by any circumstances surrounding the case, and tending to elucidate the purpose of the parties. Parol evidence may be given to establish who were the parties really insured, and such parties may recover on the policy, though not the nominal parties thereto, or named therein. *ib*
  10. Thus, if the evidence shows, conclusively, that such insurance was effected for the benefit of the widow, heirs at law and next of kin of the person named, they, or their assignee, may recover upon the policy. *ib*
  11. Under an executory contract, by the widow of a deceased owner of real and personal property, and the guardian of his infant heirs, to sell such property to the plaintiff as soon as the necessary authority could be obtained from the court, for the special guardian of the infant heirs to convey, the plaintiff went into possession of the premises as tenant of the estate, at a specified rent. The property was insured by the defendant in the name of the deceased's "estate," and before any conveyance was made, the same was destroyed by fire. *Held*, that the contract was not one which could be specifically enforced by the plaintiff; nor did he acquire any legal or equitable title to the property, or become, in any sense, the owner of it. That he had no equities, no insurable interest, nothing at risk, and, consequently, suffered no loss; but that the estate of the deceased, by such loss, acquired a right of action to recover the amount insured, up to the value of the property destroyed. *ib*
  12. *Held, also*, that a deed of the property, subsequently executed by the special guardian appointed for that purpose, was an exception to the rule, that, on judicial sales, the deed takes effect, by relation, from a time antecedent to the date; inasmuch, as by the contract between the parties, it was not to take effect, as a contract of sale, until the deed was executed and delivered, but was, up to that time, a lease of the property. And whatever the law may be, in the absence of a contract, parties may control its operation by their contract. *ib*
  13. When there is no valid contract for the sale of real estate, there can be no relation to one. *ib*
  14. Where property contracted to be sold, after being insured, was destroyed by fire before any delivery or conveyance, in consequence of which the vendors were unable to perform, and the purchaser was unwilling to perform, by taking what was left, and paying the price originally agreed upon, and a new contract was made, by which the purchaser took what was left of the property, and an assignment of the rights of action on the policy of insurance, in lieu of the real and personal property agreed to be sold; *Held*, that this was not the performance of the old, but the making and executing of a substituted contract; and that there could be no principle of subrogation applicable to the case, in the interest of the vendors. *ib*
  15. *Held, also*, that the purchaser, as assignee of the policy, was entitled to recover the amount of the policy, provided the value of all the property destroyed equaled or exceeded the amount insured therein. *ib*

16. In construing a policy of insurance, the written part is to prevail over that which is printed. *ib*

J

JAY'S TREATY.

The treaty between the United States and the government of Great Britain, commonly known as Jay's treaty, concluded and ratified by our government in 1794, expressly provided that British subjects, then holding lands in the United States, should continue to hold them according to the nature and tenure of their respective estates and titles in such lands, and might grant, sell or devise the same, as they might respectively choose to do. When this treaty was ratified, it became a part of the supreme law of the land, and rendered the title of every alien British subject, to lands in every part of the United States, then held, not only valid, but alienable by him, the same as though he had been a native born or naturalized citizen. *The People v. Snyder*, 589

JUDICIAL PROCEEDINGS.

It is a plain principle of justice, applicable to all judicial proceedings, that no person shall be condemned, or shall suffer judgment against him, without an opportunity to be heard. *Per J. C. SMITH, J. Ireland v. The City of Rochester*, 414

JUDGMENT.

It is a fundamental rule of law, and of common justice, that no one shall be concluded by a legal judgment, decision or adjudication had or made in any suit or proceeding to or in which he was not a party or privy, and of which he had no notice; or in respect to which he had no opportunity to defend himself or to litigate the question involved; or upon which his liability depended. *The Board of Supervisors of the County of Monroe v. Budlong*, 498

See EVIDENCE, 8, 9.

FORMER SUIT OR RECOVERY.

JUDICIAL PROCEEDINGS.

JUSTICE OF THE PEACE, 5 to 12.

JUDGE'S CHARGE.

See PRACTICE, 2.

JURISDICTION.

1. The Supreme Court of one judicial district, has no jurisdiction in an action pending in another district, to grant an injunction order, to restrain proceedings, in an action previously commenced and then pending in the district first mentioned. If such an injunction order is obtained it is void, and may be disregarded. *Schell v. The Erie Railway Company*. 868
2. The theory that by bringing another suit, and simply laying the venue in a different county from that in which an action is already pending, the court can be divided up so as to enable one branch of it to enjoin suitors from proceeding in another branch, is entirely inconsistent with the existence of but one court which the constitution created. That court, in the very nature of things, has no power to enjoin a suitor in it from asking to be heard; and every attempt to do so, is void. *Per CARDOZO, J.* *ib*
3. In an action brought in the Supreme Court by S. against a railway company, an injunction order was granted by a justice of the first district. Subsequently the railway company brought an action, in the same court, against S. and others, laying the venue in a county in the eighth district, and obtained from a different justice of the first district an injunction order stopping all proceedings in the action of S., restraining the clerk of the court from entering an order made by one of the judges, and forbidding the prosecution of S.'s suit, and other suits by him and others named, and directing that any person who might thereafter bring an action of the like nature, or intended to accomplish the same object, should, upon notice of such injunction order, desist and refrain from further prosecuting the same. *Held*, that the granting of the second injunction order was not a valid exercise of judicial power, and the order was void. *ib*
4. The jurisdiction of all courts and officers exercising judicial functions

is open to investigation, question and inquiry, whenever their proceedings are set up or sought to be enforced; and when there is no jurisdiction, such proceedings are absolutely void. *The Board of Supervisors of the County of Monroe v. Budlong*, 498

See JUSTICE OF THE PEACE.  
ROCHESTER, (CITY OF.)

### JUROR.

See APPEAL, 8.

### JUSTICE OF THE PEACE.

1. A justice of the peace has no jurisdiction to proceed in an action against an infant defendant after service and return of the process, until a guardian has been appointed. Until this has been done, he has no right to receive the complaint of the plaintiff, or the answer of the infant defendant. *Harvey v. Large*, 222
2. If the infant does not apply for the appointment of a guardian, the plaintiff should apply, and see to it that a guardian is properly appointed. *ib*
3. Where an infant, sued in a justices' court, does not plead his infancy, but proves it on the trial, the proper judgment for the justice to render is a judgment of dismissal, stating the reason, viz. that the defendant is an infant, and that no guardian has been appointed. If he renders a judgment against the defendant it will be void. *ib*
4. Where such a judgment of dismissal is rendered, the proceedings in that action will not be a bar to a second action. *ib*
5. Under section 63 of the Code, which provides that "a justice of the peace, on the demand of a party in whose favor he shall have rendered a judgment, shall give a transcript thereof, which may be filed and docketed in the office of the clerk of the county where the judgment was rendered," and directs that the time of the receipt of the transcript by the clerk shall be entered thereon, and entered in the docket, and "from that time the judgment shall be a judgment of the county court," there can be no judgment in the county court, unless a judgment has in fact been rendered in the justice's court. *Stevens v. Santes*, 582
6. If there has been no judgment rendered by the justice, the filing and docketing of the transcript in the county clerk's office is a mere nullity. The question is essentially jurisdictional. If it is not a judgment in the court in which the action was commenced and tried, it cannot, in the nature of things, be such in the county court. *ib*
7. Although such transcript is *prima facie* evidence, not only that the judgment has been rendered by the justice, but that he had jurisdiction to render it, and when presented to the county clerk properly certified by the justice, is sufficient to authorize him to file it, and docket the judgment; and the judgment of the county court is sufficiently established, *prima facie*, by the production in evidence of a duly certified copy of the transcript, and docket; yet it may be shown that the transcript is entirely false, or a forgery, and that no such judgment was ever in fact rendered by the justice. *ib*
8. Merely entering the verdict of the jury, in his docket, by the justice, and putting down the items of costs and adding them up with the verdict, and thus ascertaining the sum total, without doing any thing further, is not rendering a judgment on such verdict. Judgment must be rendered, and entered in some way as a judicial act. *ib*
9. The statute provides that in all cases where a verdict shall be rendered, in a justices' court, "the justice shall forthwith render judgment, and enter the same in his docket." (2 R. S. 247, § 124.) The decision must be evidenced by some official act. A decision in the mind of the justice, unless it is entered in the docket, or in the minutes of the trial, is of no avail whatever. It is not a legal rendering of judgment, and will not constitute a judgment, in law. *ib*
10. Where, although it appeared from the transcript furnished by the jus-

- tice for the county clerk, that judgment was rendered by the justice, and entered in his docket, on the day the verdict was rendered, and in his certificate the justice stated that the transcript was "a correct transcript from his docket" of a judgment on record in his office, and of the whole of said judgment; yet, it appearing from an examination of the justice's docket, on the trial, that there was no such entry therein as was stated in the transcript, and that none such had ever been made there; the justice testifying that he made the entries which appeared upon his docket, at the time the verdict was rendered, but was unable to state that he had made any entry of judgment, in his minutes, or anywhere; *Held*, that upon this evidence the referee was authorized to find, as matter of fact, that the justice never made any entry of judgment in any way, and never rendered judgment upon the verdict. *ib*
11. A judgment, in a justice's court, is not completed, so that it can be enforced by execution, until it is entered in the docket, even where it has first been entered in the minutes in due time. *ib*
12. It is not competent to prove, by parol, the entry of a judgment, not upon the minutes of the justice, nor upon his docket. *ib*

See ROCHESTER, (CITY OF.)

## L

### LANDLORD AND TENANT.

Where land is rented for a nursery, the tenant must remove the trees before he quits possession, on the termination of his lease, or the title will vest in the owner of the reversion. *Brooks v. Galster*, ✓ 196

See WASTE.

### LEASE.

1. An instrument, made since 1787, by one person to another, conveying lands in fee, in this state, operates as an assignment and not as a lease;

and hence the strict relation of landlord and tenant is not created thereby. *Lyon v. Chase*, 18

2. There is, therefore, no distinction between the covenants contained in such an instrument and other sealed instruments, so far as the presumption of payment or extinguishment is concerned. *ib*
3. Where, in an action upon the covenant to pay rent, contained in such an instrument, executed in 1799, there was no evidence to show that any rent had ever been paid upon it, during a period of sixty-four years, and it appeared affirmatively not only that the defendant had not paid rent within twenty-two years, prior to the commencement of the action, but that the plaintiff had not *claimed the same*; *Held* that upon these facts the law raised the presumption that the cause of action had been released, discharged or extinguished, and the plaintiff could not recover. *ib*
4. The presumption of payment, in such a case, will not be repelled by an admission of the defendant that there had been a general resistance and refusal to pay rent, for the last twenty-five years, by the tenants of the manor of which the lands in question constituted a part. *ib*

## LEGISLATURE.

See CONSTITUTIONAL LAW, 4 to 8.

## LETTERS.

On the 2d of December, 1784, the common council of New York, from gratitude for the distinguished services of General Washington, voted an address to him, together with the freedom of the city, in a gold box. At a subsequent meeting of the common council, on the 2d of May, 1785, the mayor produced and read a letter from Gen. Washington, in reply to the address, which was addressed to the "Honble. The Mayor, Recorder, Aldermen and Commonalty of the city of New York." By order of the common council, the address and reply were published, and entered upon the minutes. One A. was in possession

of the letter in the year 1834, and continued to possess it until his death, in November, 1863, when it passed into the hands of his executrix, who, in May, 1864, placed it in the hands of auctioneers, by whom it was sold, at auction, to the defendant L. How A. became the possessor of the letter was not shown; nor did it appear that any offer was made by L. to show title, other than simple possession. *Held* 1. That the letter was a particular and a peculiar species of property; and that its style, address and character as a response to a legislative act, should of itself be regarded as having imparted notice, to all, that from the moment of its reception and recording it became the property of the corporation to whom it was addressed. 2. That, unlike other personal property, which ordinarily possesses but little, if any, distinctive mark which might place individuals upon inquiry, this letter, so written, in such terms, and so addressed, held A. to constantly recurring notice of its ownership by the corporation. 3. That the evidence as to title to the letter was of that character which called for a finding by the jury thereon, and their finding in favor of the plaintiffs was conclusive between the parties. *The Mayor, &c. of the City of New York v. Lent*, 19

See EVIDENCE, 12.  
POSSESSION, 1.

#### LIMITATIONS, STATUTE OF.

See WILL, 4.

#### LOST PAPERS.

See EVIDENCE, 12.

#### LUNATIC.

See HUSBAND AND WIFE.

### M

#### MAINTENANCE.

1. Illegal maintenance was repealed or abrogated by the Revised Statutes,

and does not now exist in this state, except in the single case mentioned in those statutes. *Voorhees v. Dorr*, 680

2. C. claimed to have a demand against M. which, being about to leave the state, he wished to have prosecuted. It was thereupon agreed between the plaintiff and defendant and C. that the latter should assign his claim to the plaintiff, and that the defendant should prosecute the demand as attorney, in the plaintiff's name, but the plaintiff was to have no interest in the moneys recovered. The defendant agreed to pay the plaintiff \$50, whenever the action was determined, together with his necessary expenses in attending court. His compensation for the time spent in attending court was to be included in the \$50, and he was to be saved harmless from all costs and expenses of the litigation. *Held*, that although this agreement, so far as the plaintiff was concerned, came exactly within the general definition of maintenance, yet that it did not fall within the condemnation of the statute, and being in no respect contrary to any existing law, it could be enforced. *ib*

3. *Held, also*, that the plaintiff, when he entered into this agreement with the defendant, was not guilty of doing an illegal act; and it was not barratry on his part, because it was but a single instance, and that offense consists in the *practice* or *habit* of stirring up strife. *ib*

4. *Held, further*, that the case did not fall within the provisions of the Revised Statutes forbidding attorneys, &c. buying rights in action to prosecute, or lending or advancing money, &c. to procure suits, and making all such acts misdemeanors, and subjecting such attorneys, &c. to removal from office; nor within the scope of the maxim *ex turpi causa non oritur actio*. *ib*

#### MARRIAGE.

1. Where, in an action by a husband against his wife, to obtain a decree declaring void a marriage between them, for the reason that the defendant at the time of such marriage, had a husband living, and from

whom she had never been divorced, the facts alleged in the complaint are undisputed, the marriage between the parties is absolutely void, and no court can hesitate to decree the nullity of the marriage. *Appleton v. Warner*, 270

2. "May" means "must," in statutes conferring powers upon courts in cases like this. *ib*
3. Where the defendant is not the plaintiff's wife, and she admits the facts showing she is not, and does not claim to be such, the power to grant a counsel fee and alimony should not be exercised in her favor. *ib*
4. Should the court finally determine, as a matter of discretion, that it will not decree the nullity of the marriage, still there is no legal marriage. Still the defendant is not the plaintiff's wife. This being clear at the commencement of the controversy, the plaintiff is under no obligation to support the defendant or to pay her counsel. *ib*

#### MARRIED WOMEN.\*

See WILL, 7, 8, 9, 10.

#### MEMORANDUM.

See EVIDENCE, 1, 2, 3, 6.

#### MESNE PROFITS.

1. A disseisee of land cannot maintain an action against the disseisor, or any one acting under him, for an injury to the premises while he is out of possession, but after a re-entry he can recover for any such injury, and for the rents and profits. *Van Alstyne v. McCarty*, 828
2. Where an action of ejectment is brought against one in possession as tenant of another, and the defendant gives notice of the suit to such other person, as required by statute, the latter, in the absence of any proof to the contrary, will be deemed to have assumed the defense of the action, and will be concluded by a recovery therein against the defendant. *ib*

3. Although the statute declares a recovery in ejectment shall be "conclusive against the defendant and all persons claiming through or under such party by title occurring after the commencement of the action," yet a person having notice of the action, and having assumed its defense, will be deemed the real party in the suit, within the spirit and intent of the statute; or if not, he will be bound by the recovery, on the ground that he had notice of the suit and was called upon to defend. *ib*

4. Hence an action will lie against such person for the mesne profits, without any recovery in an action of ejectment brought against him. *ib*

5. If he is not concluded by the judgment in the ejectment suit, on the ground that he was the real party defending the action, and bound by the recovery therein, he will be liable for the rents and profits, at common law, after the plaintiff has recovered possession, where it appears that he has actually received such rents and profits. *ib*

#### MITIGATION OF DAMAGES.

See SLANDER, 6, 7, 9.

#### MONEY HAD AND RECEIVED.

Although, in general, to support the action for money had and received, it is necessary to prove that the defendant actually received money or its equivalent, for the use of the plaintiff, yet where property is received as money the action will lie, the same as if money had been received. *Allen v. Brown*, 86

#### MORTGAGE.

1. A subsequent party in interest, whether by way of mortgage, lease or judgment, cannot on a motion obtain a right to redeem and have the property conveyed to him by a purchaser. The only remedy in such a case is by action seeking to enforce such right to redeem; and in such an action the rights of all other parties can be protected. *Douglass v. Woodworth*, 79

2. Where such a motion is made in a foreclosure suit, after the property has been sold and the deed delivered, by lessees for a term of years, alleging that they were misled by erroneous information, all that can be done is to open the judgment, set aside the sale and the conveyance, allow the lessees to put in an answer, and order a resale of the property. *ib*

3. This can only be done on terms of indemnifying the purchaser, repaying to him the money paid by him on the purchase, and all expenses incidental thereto. *ib*

4. The purchaser, in such a case, should have the election of permitting the resale, or of ratifying the lease to the applicants; and if he elects to do the latter, the sale should not be disturbed. *ib*

5. *It seems*, the proper remedy of the lessees is to claim the value of their lease out of the surplus, rather than by motion to redeem. *ib*

6. The plaintiff, being the assignee of a mortgage made by P. employed S. an attorney, to foreclose the same by advertisement, who caused a notice of the sale to be published, appointing the 8th day of September, 1866, for the day of sale. The defendant, desiring to bid upon the property, but having doubts about the legality of the proceedings, requested S. to adjourn the sale one week. S. consented to this, provided the defendant would give him \$100 for a claim he had against the mortgagor's wife, to which the defendant assented, and the sale was adjourned. S. becoming satisfied his proceedings were not legal, commenced new proceedings, and appointed December 10, 1866, as the day of sale; on which day the plaintiff directed S. to adjourn the sale two weeks, and countermanded instructions previously given to a third person to attend the sale, and bid off the premises. S. disregarded the direction given him, and sold the property, on the day appointed, to the defendant, he being the highest bidder, for \$2100, subject to a prior incumbrance of \$571; the property being worth \$4000. The defendant had no knowledge, at the time of the sale, of any

instructions to S. to adjourn the same. There was no agreement between S. and the defendant to share any profits arising from a resale, and the \$100 had never been paid by the latter to the former. S. was irresponsible. *Held*, 1. That if there was any fraud in the matter, for which the defendant was liable, it was in procuring S. not to sell the premises on the day originally appointed; and that the agreement for the payment of the \$100, made in September, and the neglect to sell then, had no connection with, or relation to, the sale made in December, upon a new notice. 2. That assuming that there was no fraud in the case, on the part of the defendant, he having paid for the property more than two thirds of its value, as found by the referee, and nearly the full value, as estimated by some of the witnesses, the hardship was not so severe on the plaintiff, that the court would grant relief, allowing the sale to stand as security for the money paid by the defendant. 3. That the case was not within the principle laid down in *Boyd v. Dunlap*, (1 *John. Ch.* 478,) that where a deed is sought to be set aside as voluntary and fraudulent against creditors, and there is not sufficient evidence of fraud to induce the court to avoid it absolutely, but suspicious circumstances as to the adequacy of the consideration, and fairness of the transaction, the court will not set aside the conveyance altogether, but permit it to stand as security for the sum actually paid. 4. That S. being authorized to make the sale, employed for that purpose, and acting within the scope of his authority, and the defendant purchasing the premises without knowledge of any private instructions to such agent, his rights were not affected by the fact that such agent made the sale contrary to, and in disregard of, the instructions of his principal. 5. That it was not a case coming within the authorities relating to client and attorney, in which the court will, at the instance of the client, relieve him from some improper act of the attorney; it not being a case in court, or a judicial proceeding, but a sale under the power in the mortgage, by S. the agent, or attorney in fact, employed to make the same. 6. That had S. refused to pay over the money re-



ceived on the sale of the premises, the court would have entertained summary proceedings against him, to enforce the payment of the money; the employment to foreclose a mortgage by advertisement, being regarded as so connected with his professional character as to afford the presumption that such character formed the ground of his employment. But when another person is to be affected, other principles of law, as to him, are to be consulted. *Leet v. McMaster*, 286

7. A notice of sale, on a statutory foreclosure, need not specify that the mortgage will be foreclosed. *ib*

See RAILROAD COMPANIES, 2, 3.

#### MUNICIPAL CORPORATIONS.

- I. It results from the several provisions of the general statute of 1847, authorizing the incorporation of villages, (*Laws of 1847, p. 582, ch. 426,*) that a village incorporated thereunder has no power to cause sidewalks to be made or constructed except in the mode, and by means of the agencies, therein provided; that the trustees have no authority to construct or repair sidewalks, until the electors, by resolution duly adopted, direct them to cause the work to be done, and also direct them to cause money to be raised by tax for the necessary advances for such work; that the powers of the electors over the subject are limited; and that within the limits prescribed, their powers are wholly discretionary. *Herrington v. The Village of Corning*, 396
2. Until the electors have directed the work to be done and the money to be raised, and the money has been raised, there is no fixed and absolute duty on the part of the trustees to cause the work to be done. *ib*
8. It was not the intention of the statute to confer upon the corporation formed under it, or upon their officers, an absolute power to make, or cause to be made and kept in repair, sidewalks along their streets, thus involving taxation to an unknown extent; but the subject is referred to the discretion of the

electors in their collective capacity, who by their action may impose upon the trustees the duty of causing any particular sidewalk to be made or repaired. *ib*

4. The policy of the statute is to protect the rights of individual lot owners against an undue wielding of corporate or official power; and if, in consequence of its operation, useful repairs or constructions are sometimes delayed or prevented, whereby an individual sustains peculiar damage, he suffers no legal injury, and the law gives him no remedy. *ib*
5. The peculiar provisions of the act of 1847, prescribing the only means by which the corporate power to make or repair sidewalks can be exercised, and limiting the authority of the trustees, and of the electors themselves, on that subject, leave no room to imply a contract by the corporation to make sidewalks, or keep them in repair, otherwise than as the statute prescribes. *ib*
6. Where an injury to the plaintiff resulted from the decayed condition of a sidewalk which the defendants, a village incorporated under the provisions of the act of 1847, had caused to be constructed several years before the injury, in front of a lot owned by a non-resident; it not appearing that prior to the injury any resolution had been adopted at a meeting of the electors, directing the trustees to cause that particular sidewalk to be repaired, or providing that money be raised by tax for the necessary advances therefor; *it was held*, that no action could be maintained against the village corporation, for such injury. *ib*
7. *Held, also*, that a resolution adopted by the electors of the village, prior to the injury, authorizing the trustees to cause sidewalks to be built and kept in repair by the owners of lots "on each and every street of the village, when in their judgment the good and welfare of the inhabitants" should require it, "without any further vote of the people," did not aid the plaintiff's case; it being of questionable authority as not specifying any sidewalk to be constructed or repaired, and if valid it

- was not mandatory in respect to any particular sidewalk, but conferring a general and purely discretionary power as to what sidewalks, if any, should be made or repaired, and as to the time when the work should be done. *ib*
8. Section 18 of chapter 559 of the Laws of 1864, amending the general statute of 1847, so far as it relates to a fund for sidewalks, refers to such sidewalks only as are directed to be made or repaired pursuant to the provisions of section 15, of the same act, to wit, after a vote by ballot, for the purpose, by a majority of the taxable voters of the village, does not apply to a case where there is no evidence that such a vote has been taken. *ib*
9. A village corporation is not liable for personal injuries resulting from the decayed condition of a sidewalk, on the ground that, having constructed the sidewalk originally, it is bound to keep it in repair. *ib*
10. The charter of the city of Rochester required that before the common council should determine to open, widen or improve any street, &c. the expense of which, in whole or in part, was to be defrayed by a local assessment, they should cause an estimate thereof to be made, and should, by an entry in their minutes, describe the portion or part of the city which they deemed proper to be assessed for such expense. And that they should cause a notice to be published, for a specified time, in a daily newspaper, specifying such improvement, the estimated expense thereof, and the portion or part of the city to be assessed for such expense; and requiring all persons interested to attend the common council at the time appointed in such notice. That at the time appointed in such notice the common council should proceed to hear the allegations of the owners and occupants of houses and lots situated within the portion of the city so described, and after hearing the same, should make such further order in respect to such improvement as they should deem proper. Such a notice having been published, in respect to proposed improvements in an avenue, the common council, at the time appointed, viz. on the 11th of July, 1865, met, and without taking any final action, adjourned from time to time till the 22d of August, 1865, when they proceeded to hear allegations in relation to the proposed improvements, and adopted an ordinance for making such improvements. *Held* that the original notice being regular, and the board having met at the time therein appointed, they had jurisdiction of the proceeding, and could then hear allegations, if they were to be made, or could adjourn, in their discretion, to any other time specified; in which latter case, the proceedings would be carried over to the adjourned day, to be then taken up at the stage at which they were left at the preceding meeting. That these proceedings of the board were therefore regular; it not appearing that any person who attended the first or any subsequent meeting, to make allegations, was denied an opportunity of making them, or was not heard. *Ireland v. The City of Rochester*, 414
11. By an amendment of section 164 of the charter of the city of Rochester, adopted in 1865 it is provided that no contract shall be let for making any public improvement, at a price greater than the estimate thereof. *Held* that the amendment means, simply, that in contracting for making a public improvement, the work included in the estimate shall not be let at a higher price than that specified in the estimate. That it does not prohibit the common council from causing other work to be done, in addition to that included in the estimate, if they find it necessary, in order to complete the improvement. *ib*
12. Such amendment is not inconsistent with section 207 of the charter, which provides that if a greater sum of money is expended in the improvement than was estimated, the common council may direct an assessment to collect the same. *ib*
13. If the excess of expenditure for a given improvement is not for work included in the estimate, but is for work not embraced in the ordinance, the common council has authority, under section 207, to direct an assessment of money to meet such excess. *ib*

14. The common council having authority to make an expenditure, for an improvement in excess of the estimate, in their discretion, and to levy an assessment to meet it, and having passed a resolution for that purpose, which recites the fact that an expenditure has been made, in such improvement, of a specified sum in excess of the estimate, the resolution itself, if valid, is at least *prima facie* evidence of such expenditure. ib
15. Section 207 of said charter, provides that "If it shall appear that a greater sum of money has been expended in the completion of such improvements, than was estimated \* \* \* the common council may direct the assessment of the same on the owners and occupants of houses and lands benefited by such improvements, in the same manner as herein directed, and the same proceedings in all respects shall be had thereon, *and the common council may enlarge the territory to be assessed for such improvements.*" If the common council, assuming to act under the authority of this section, pass a resolution enlarging the territory to be assessed for the excess of the expense of the improvement of an avenue, beyond the original estimate, without notice to the owners of the lots to be assessed in the enlarged territory, and without giving them an opportunity to be heard upon the question whether they are benefited by the improvement and should be taxed to defray the expense of it, such resolution is a nullity, as to such owners. This is so without reference to the question whether the charter requires notice to be given. It is in the nature of a judicial proceeding against such owners, and its effect is to take their property for public use. ib
16. The common council do not acquire jurisdiction as to the owners and occupants of lots in the enlarged territory, by virtue of the original proceeding to which they were not parties. The proceeding is commenced, as to them, by the attempt to enlarge the territory. ib
17. The statute in question, conferring upon the common council this extended authority over local assessments, is a legitimate exercise of the taxing power, if it provides for notice to those assessed; but not otherwise. ib
18. The want of notice is not cured by the provisions of sections 207 and 208 of the city charter declaring the proceedings valid notwithstanding any "irregularity, omission or error." These provisions do not extend to jurisdictional defects. ib
19. The common council cannot direct an assessment for a deficiency, without notice to those on whom such assessment will fall, even though they are occupants of the original territory, and as such had notice of the original proceeding. ib
20. Such notice, in proceedings for a re-assessment, need not be in the precise form prescribed by section 164 of the charter. It is enough that the notice specify the action proposed to be taken, and conform to the requirements of section 164, so far as they are applicable to the case. ib
21. In the proceedings for a re-assessment, no person can be heard upon any question which was finally decided in the original proceeding. The question whether the improvement should be made is of that nature. So, the owners and occupants of houses and lots in the original territory, who were duly notified, and were decided to be benefited by the improvement, and ordered to be assessed for it, cannot raise again the question as to their liability to be assessed. But the question whether the work has cost more than the estimate, is open to them, as well as to the occupants of the new territory proposed to be brought in; and the latter may also be heard in respect to the allegation that they are benefited by the improvement and ought to be assessed. ib
22. The whole policy of the charter of the city of Rochester, so far as it can be gathered from the language employed, is opposed to the idea that the owners of lands may be assessed for local improvements without no-

tice; whether the assessment is for the purpose of raising the original estimate, or meeting a deficiency; and whether the lands are within the original or the enlarged territory. *Per J. C. SMITH, J.*   *ib*

23. The legislature have not expressed themselves in language which indicates an intention to exceed their constitutional powers; and such an intention is not to be implied, if a different construction can be fairly adopted. *Per J. C. SMITH, J.*   *ib*

24. If an assessment is void as to persons whose property is assessed, their right to maintain an action to restrain the city from collecting it, is clear, not only to avoid a multiplicity of suits, but also to remove a cloud from their respective titles created by the lien of the assessment.   *ib*

#### MUTUAL MISTAKE.

*See* PARTITION.

### N

#### NEGLIGENCE.

The question of negligence is peculiarly a question of fact to be determined by the jury; and the case must be very clear which will justify the court in withholding it from their consideration. *Wooden v. Austin*, 9

*See* MUNICIPAL CORPORATIONS.  
TOWING.

#### NEW YORK, (CITY OF.)

1. The limitation of four months within which the commissioners are required to complete their report, contained in the act of 1862, does not apply to a proceeding under the act of April 24, 1865, it being impracticable properly to complete such a work as is contemplated by the latter statute within that limitation. *Matter of the application of the commissioners of the Central Park*, 277

2. It has been long since settled, and the rule has been uniformly acted

upon by this court, that a mere error of judgment in the valuation of property taken for a street, is not the subject of review on a motion to confirm the report, unless the sum allowed was grossly inadequate and unequal as compared with other valuations, or unless some wrong principle was adopted as to the amount allowed.   *ib*

3. Under a provision in a statute directing how the commissioners shall be appointed, viz. by a notice specifying the time and place of making the application, and the nature and extent of the intended improvement, it is necessary that the whole extent of the intended opening should be stated in the notice. The owners are to be informed by it what property is to be taken. A reference to a map on file in some public office is not a compliance with the statute.   *ib*

4. The fact that owners have, in some cases, appeared before the commissioners and claimed an allowance for their land, cannot give jurisdiction if it is not acquired in the mode prescribed by law.   *ib*

5. The commissioners must be confined to the land which the notice describes as required for the improvement.   *ib*

6. Where a statute authorizing the laying out of a road or drive described it as a road or public drive running from the northerly portion of the Sixth or Seventh avenues, &c. and to enter the Central Park at, &c. and to follow the course of the Bloomingdale road below 106th street, when the commissioners should deem such course advantageous, and provided that they should determine the location, width, course, windings, &c. of said road; *Held* that the act did not authorize the taking of any land not required for the drive or road; and that the latter provision seemed to prescribe an uniform width to the road.   *ib*

7. *Held, also*, that considering the intent of the statute to make a road of a uniform width, and the notice as given of such road, without referring to the gores outside of the road, there was no necessary author-

ity for taking land outside of the lines of the road as laid out. *ib*

8. And where the notice not only did not include such gores, but virtually excluded them, by saying: "Said road or public drive is of a general width of one hundred and fifty feet, as shown on a certain map," &c.; *Held* that the commissioners had no jurisdiction to take such gores; and that so far as they were included in the proceedings, they were erroneously taken. *ib*

*See* ACTION, 2.

ASSESSMENTS.

CONSTITUTIONAL LAW, 1 to 6.

## O

### OWNERSHIP.

*See* LETTERS.

POSSESSION.

## P

### PARTIES.

An objection that all the persons united in interest are not made plaintiffs, must be set up in the pleadings, or it will be deemed waived. *Ireland v. The City of Rochester*, 414

*See* EJECTMENT.

JUDGMENT.

### PARTITION.

1. By a judgment in partition, lot No. 2 of the premises partitioned was set off and assigned to the plaintiff by its number, and by metes and bounds, by which it was bounded south by lot No. 8, which was assigned to McB. under whom the defendant claimed. These lots were both designated on a map or allotment of great lot No. 9, known as the third allotment. In such judgment reference was had to this map and allotment, but the judgment did not assume to divide any of the lots, or to change the original lines thereof,

the measurements and descriptions therein being simply designed to give the boundaries of the lots according to the original lines of such lots upon the said third allotment. The surveyor, in describing and in running the lines of lot No. 2, made a mistake in respect to the southern boundary, by which he apparently added a strip of land, the whole length of said lot, of about fourteen rods in width, to lot No. 8, and diminished the size of lot No. 2, to that extent. *Held* 1. That the plaintiff was entitled to the whole of lot No. 2, and had title to it; and that this error of the surveyor did not affect such title. 2. That it was clearly the intention of the commissioners to assign the plaintiff, in the partition, the whole of lot No. 2, as the same was known and designated on the original map of the third allotment of great lot No. 9; and the mistake of the commissioners was a mere misdescription of the boundaries of said lot, and not an assignment of the particular parcel of land independent of its original lines and its true boundary. 3. That although, if possession had been taken of lot No. 8, and it had been fenced, used and occupied up to the erroneous line, and such adverse use had been acquiesced in, or such line recognized as the true line, for the period of twenty years, it would have become the legal, fixed and boundary line of division between lots No. 2 and 8, by force of the statute, yet as the erroneous line ran through wild land, with no clearing, improvement or fence on either side of it, and there was no question of adverse possession, the location of the line as made by the survey had about it none of the elements of a line located by the parties *in pais*, where rights have been acquired upon the assumption that it is the true line. 4. That it was a case of *mutual mistake*, the commissioners being the agents of both parties, and the plaintiff having done nothing to estop her from asserting her right to hold the whole of lot No. 2, to the extent of the true southern boundary. 5. That McB. and the defendant claiming under him, could not hold the strip of land belonging to lot No. 2, it being confessedly not a part of lot No. 8, and they never having been in pos-

session of it, or exercising any rights of possession over it calling upon the plaintiff to assert her rights in respect to the disputed territory. *Townsend v. Hoyt*, 884

2. Accordingly held that an action would lie by the plaintiff against the defendant for trespass, in cutting timber upon the disputed territory. 43

### PARTNERSHIP.

1. The plaintiff, a member of a partnership firm, sold out his interest to J. for \$5000, and the new firm, bearing the same name, assumed the company debts. To secure the plaintiff for his liability on account of these debts, J. executed his bond to the plaintiff, with the defendant C. as his surety, by which they bound themselves "to pay so much of the debts of the old firm as the plaintiff was or should in any event become liable to pay." Held, 1. That on the dissolution of the old firm and the formation of the new one, the members of the new firm became the principal debtors, and, as between the members of the two firms, were primarily liable to pay the debts of the old firm. 2. That a note, on time, given by the new firm, to pay an old debt, and accepted by the creditor, with knowledge of the change of membership, was a satisfaction of such debt. 8. That regarding the note as given in the name of the old firm, by one of the new members, the plaintiff was not liable as one of the makers, unless he assented to it; and if he did assent, it was such a change and postponement of the original debt as to discharge the surety. 4. That the plaintiff, having a valid defense to the note, could not, without notice to the surety, allow it to pass into judgment against himself, and then, by paying it charge the surety. *Thurber v. Corbin*, 215
2. Where an individual, though not in fact a member of a firm, has held himself out to the plaintiffs and to the public as a partner, so that the plaintiffs had reason to believe, and did believe he was a member, and on the faith of his representations trusted the firm, he will be estopped

from denying that he was a partner, and liable upon that ground. *Vishard v. Roderrick*, 616

8. It is not necessary that he should have declared, in express terms, that he was such partner; if he held himself out to be such, in other ways calculated and intended to induce the belief of prudent business men, that is enough. 43

### PAYMENT.

See BOND.  
LEASE.

### PERSONAL INJURIES.

See MUNICIPAL CORPORATIONS, 6, 9.

### PLEADING.

See COMPLAINT.  
SLANDER, 5, 7, 9.

### POSSESSION.

1. The rule, of general application, that the possession of personal property implies ownership, against the world, is exceptional in certain cases. *The Mayor &c. of the City of New York v. Lent*, 19
2. Possession and claim of title under an erroneous location, short of twenty years, is not sufficient to establish title in the occupant, as against a valid paper title; unless such location was made, and the possession under it has been continued, under such circumstances as to estop the party having the paper title from asserting his claim against such occupant. *Raynor v. Timerson*, 517

### PRACTICE.

1. Mere formal defects in the return of a commission will not be regarded on the trial. *Burrill v. The Watertown Bank*, 106
2. An exception to a single word, in a sentence of the judge's charge, which has no bearing upon any issue, or question in the case, will not be

allowed or entertained. *Raynor v. Timerson*, 517

See APPEAL.  
EVIDENCE.  
VARIANCE.

**PRESUMPTION.**

See EJECTMENT, 6, 7, 8.  
LEASE, 2, 3, 4.  
PROMISSORY NOTES, 8.

**PRINCIPAL AND AGENT.**

1. Where an agent, appointed to settle claims against a third party, receives from the debtor promissory notes for the amount, payable at future periods, which are perfectly good and in fact paid when due, and before maturity sells the same for less than the face thereof, without consulting with or informing his principals, and without making any inquiries of parties with whom funds have been deposited for their payment, and on being called upon to account denies that he has received any thing on the notes, for which he is liable to account, such sale is a clear violation of his duty to his principals, and warrants a finding that the sale was without authority. *Allen v. Brown*, 86

2. In such a case the principals can recover of the agent the excess of the amount of the notes over and above the sum actually paid to him, under a complaint containing allegations equivalent, in substance, to the count for money had and received, to the whole amount of the notes. *ib*
3. Under such circumstances, the agent is liable upon the ground that the notes which he took in satisfaction of the demand of his principals being good and collectable, and he having by his transactions released the debtor, and deprived his principals of all remedy except against himself, he is to be treated as having made himself answerable to them for the full amount he ought to have received from the debtor. *ib*
4. An assignment, by the creditors, transferring, in terms, to the assignee, all the right, title and interest of the assignors, and each of them, to the notes and the avails thereof.

and the moneys received by their agent upon the settling and arranging of the claims against the debtor, passes their right of action against the agent, for money had and received, to the full amount of the notes. *ib*

5. Where such assignment is absolute, and valid on its face, and transfers to the assignee a perfect legal title, his right to maintain an action is not affected by the fact that nothing was paid for the assignment; nor by the circumstance that one of the assignors agreed to take care of the case and to save the assignee from costs if he was unsuccessful. *ib*
6. The fact that the principals were joint owners of the original claims against the debtor will not prevent either of them from maintaining an action to recover his share of the money collected thereon by their agent. *ib*

**PRINCIPAL AND SURETY.**

See PARTNERSHIP, 1.

**PROHIBITION (WRIT OF).**

1. A writ of prohibition issues, to forbid a court and party to whom it is directed, from proceeding in any matter designated, then pending before it. It will lie to prevent the exercise of unauthorized power by an inferior tribunal, in cases where it has jurisdiction, as well as where it has not jurisdiction. *Matter of Sweet v. Hulbert*, 812
2. The writ does not issue, of course; it is always in the discretion of the court, and should not issue where the party has a complete and adequate remedy at law. *ib*
3. Under a statute authorizing a certain town to issue bonds, to aid in the construction of a railroad, which provides that on the application in writing of twelve or more freeholders, it shall be the duty of the county judge to appoint, under his hand and seal, three freeholders, residents of the town, to be commissioners of such town, to carry into effect the purposes of the act, the

- action of the county judge, on such application, is *judicial*. It is conferred by the statute upon the office of county judge, to be exercised under its seal. The duty requires the exercise of judgment and discretion in the selection of commissioners; and in no sense is the act of selecting them *ministerial*. *ib*
4. If the act under which such application to the county judge is made is unconstitutional, or otherwise unauthorized, that officer should not be permitted to proceed under it. *ib*

#### PROMISSORY NOTES.

1. The equities of a party who takes negotiable paper before maturity, in good faith, and pays for it, or pays part of the consideration therefor, by the surrender and extinguishment of the note or other security for a debt due to him from the assignor or previous holder of the paper transferred, are superior to those of the original maker or indorser of such paper. *Bromley v. Walker*, 208
2. Thus where V., the payee and indorser of a promissory note for \$200, made by the defendant, sold and delivered the same, before maturity, to G. for \$100 in cash, and his own note for \$100, held by G. for a previous indebtedness, at the same time giving his note for the interest on the note so surrendered, and G. taking such note made by the defendant in good faith and without notice; *Held* that these facts brought the case within the decisions in *Stettheimer v. Meyer*, (33 Barb. 216,) and *Brown, Ex'r, &c. v. Leavitt*, (31 N. Y. Rep. 113,) and within the principle declared in *Young v. Lee*, (2 Kern. 554;) and that G. was a *bona fide* holder of the note so purchased by him. *ib*
3. Where, in an action upon a promissory note signed in the name of a firm, it is proved that the body and signature are both in the defendant's handwriting, and there is nothing in the signature to indicate that the defendant signed the note as the agent of any other person, the presumption arises that he was one of the makers. *Vibbard v. Roderick*, 616
4. No one can become a *bona fide* holder of a promissory note, so as to shut out a valid defense by the maker, when such holder takes it after, by its terms, money is past due upon it. *Newell v. Gregg*, 263
5. Where a note is for the payment of money at a specified time, with interest payable annually, the payment of interest *annually* is as much a part of the agreement as the promise to pay the principal. It is a portion of the debt, and if, when the note is sold to a third person, by the payee, a year's interest is past due, the note is then dishonored. *ib*
6. When the instrument furnishes evidence that the written promise to pay has been broken, a party taking the same takes it with a warning that the maker may have some defense. *ib*
7. Where the holder of a promissory note which is invalid in his hands, by reason of its having been already paid, wrongfully transfers it, before maturity, to a *bona fide* holder, who enforces payment thereof, an action will lie against such original holder, by the maker, to recover back the amount. *ib*

#### See PARTNERSHIP, 1.

#### PULTENEY ESTATE.

1. The act of the legislature of this state, passed April 20, 1798, expressly authorized the conveyance of lands to aliens, and made conveyances to them valid to vest the estate thereby granted, in such alien, "to have and to hold the same to his, her or their heirs and assigns forever, any plea of alienism to the contrary notwithstanding." (4 N. Y. Stat. at Large, 294.) *The People v. Snyder*, 589
2. Under this statute Sir William Pulteney, who was an alien, took and held a perfectly valid title to all the lands embraced in the deed to him from Charles Williamson and wife, dated March 31, 1801; he having complied, fully, with the conditions prescribed in the second section of the aforesaid act, and had his conveyance recorded, in the office



of the secretary of state, within twelve months after the date thereof. *ib*

8. The complete and perfect validity of the title, in *Sir William Pulteney*, has been often affirmed by the courts of this state; and the whole question having been carefully examined, and the validity of the title distinctly affirmed, in the case of *The Duke of Cumberland v. Graves*, (7 N. Y. Rep. 806,) that decision, by the court of last resort, ought to put the question of the validity of such title at rest, forever. *Per* JOHNSON, J. *ib*

## R

### RAILROAD COMPANIES.

1. The doctrine that the rolling stock of a railroad company in all cases is to be considered as personal property, and as not passing under a mortgage of the road and its appurtenances, not acceded to. *Hoyle v. The Plattsburgh and Montreal Railroad Company*, 45
2. Where it was found by the referee, and was conceded, that a mortgage of its road and franchise, executed by a railroad company, was sufficient to include in the mortgaged property the rolling stock, and the parties intended that the rolling stock and equipments of the road should pass, as a part of the road and as necessary to its use; the object of the mortgage being to provide funds for the building of the road and preparing it for travel, and the intent of the parties was to secure the bondholders by a mortgage on the whole property in the road as used by the company for travel; *Held* that such a construction should be given to the instrument as to include therein the rolling stock, although not expressly named. *ib*
3. The 28th section of the general railroad act, (*Laws of 1850, p. 211*,) authorizing railroad corporations to borrow money for the building of their roads, or operating them, and to mortgage all their corporate property and franchises to secure the payment thereof, contemplates a

mortgage of all the property, whether land, road, rolling stock or franchise, and warrants the conclusion that it was the intent of the legislature that the whole should be included in one mortgage and treated as a mortgage of the road and its accessories. Such a mortgage need not be treated as a chattel mortgage, and filed as such, in order to give it validity as against judgment creditors. *ib*

4. By an act of consolidation, between railroad companies, it was agreed that the preferred stock should be entitled first to seven per cent from the income of the consolidated road; then the common stock was to have seven per cent; then the preferred stock was to have three per cent further; and afterwards the common stock could share in the balance. Subsequently, a dividend was declared by which ten per cent on the amount of the capital was awarded to both classes of the stock, but such dividend was made payable in preferred stock to the holders of preferred stock, and in common stock to the holders of stock in that class. By this distribution, at the then value of the stock, the holder of a share of preferred stock received stock to the market value of about \$8, and the holder of a share of common stock received stock to the value of about \$7. *Held* that this gave to the holder of the common stock all he had a right to claim, and all that he was entitled to until the dividend of the preferred stock amounted to ten per cent. And that whether, therefore, the dividend was estimated in the nominal value of the stock, or as the cash value, there was no departure from the contract with the holders of the preferred stock, in such dividend. *Howell v. The Chicago and North Western Railroad Company*, 878

### RECEIPT.

*See* EXPRESS COMPANIES.  
STAMPS.

### RECOUPMENT.

*See* VENDOR AND PURCHASER, 12.

**REDEMPTION.**

*See* MORTGAGE, 1, 2.

**REFEREE.**

*See* EVIDENCE, 9.

**REFEREE'S REPORT.**

Exceptions to the report of a referee should not be general. They should be specific, and point out the error complained of. *Loomis v. Loomis*, 267

**RENT CHARGE.**

*See* EJECTMENT, 10, 11.

**REVENUE ACT.**

*See* VENDOR AND PURCHASER, 9, 10 11.

**ROCHESTER, (CITY OF.)**

1. The charter of the city of Rochester, which creates three justices of the peace in said city, to be elected by the legal voters of the city, and provides that in exercising civil jurisdiction, they shall be deemed justices of the peace of the county of Monroe, and that the general laws relating to proceedings before justices of the peace of the several towns in the state, shall be applicable to proceedings before them, does not violate the provisions of section 17 of the 6th article of the constitution of this state, respecting the mode of electing justices of the peace. *Dawson v. Horan*, 459
2. Those provisions relate only to justices of the peace of towns; and the 14th section expressly empowers the legislature to establish, in cities, inferior local courts of civil and criminal jurisdiction, and the enactment of the charter is a valid exercise of such power. *ib*
3. The provision of the charter which makes applicable to proceedings before the city justices, all the general laws of the state relating to proceedings before the justices of the several towns, is sufficiently comprehensive

to embrace subsequent as well as prior enactments. *ib*

4. The law extending the jurisdiction of justices, in actions on contract, to \$200, (*Laws of 1861, ch. 158.*) having been passed on the same day as the charter of the city, it is to be presumed that, in enacting it, the legislature had in view the provision of the charter above referred to. The effect of the two enactments, read together, (as they should be,) is to extend the jurisdiction of the justices of the peace of the city of Rochester. *ib*

5. The act of 1861, extending the jurisdiction of justices of the peace is not void as being in violation of the provisions of the constitution respecting the right of trial by jury. (*Const. art. 1, § 2.*) *ib*

6. There is nothing in the constitution which prohibits the legislature from enlarging the jurisdiction of justices' courts in the mode contemplated by that act. *ib*

7. Such increase of jurisdiction is not obnoxious to the constitutional provision referred to, by reason of the circumstance that it transfers a class of cases from courts of record where juries are composed of twelve men, to justices' courts in which they consist of six. The right of trial by jury remains unimpaired, in each court. *ib*

*See* DEDICATION.

## MUNICIPAL CORPORATIONS.

**S****SALE.**

*See* VENDOR AND PURCHASER.

**SET OFF.**

*See* BROKER.

**SHERIFF.**

1. The official character of an individual as sheriff in another state, and a bench warrant issued to him as such sheriff upon an indictment

found in that state, will not authorize him to arrest the person named therein within this state and carry him beyond its boundaries. In respect to those acts he is to be treated as a private person acting without legal process. *Mandeville v. Guernsey*, 99

2. Under section 248 of the Code of Procedure, which provides that the sheriff shall be entitled to poundage upon the amount paid on the "settlement" of an attachment suit, the sheriff is entitled to poundage where an arrangement is made by which the defendants agree to pay certain drafts if the suit shall be discontinued, and this is done, and the money paid. *Pritchard v. The Bank of California*, 184

#### SIDEWALKS.

See MUNICIPAL CORPORATIONS.

#### SLANDER.

1. If words are spoken of a person charging him, in express terms, with the crime of perjury, they are actionable without proof of any extrinsic facts to show their meaning. Such words necessarily import that the person charged has sworn falsely upon a material point, in a judicial proceeding before a court or officer of competent jurisdiction. *Kern v. Towseley*, 385
2. So if the words uttered, although not charging perjury in express terms, necessarily imply that offense. *ib*
3. In like manner, if the words used to express the charge, are such, in the sense in which they would naturally be understood, as to convey to the minds as those to whom they are addressed, the impression that the plaintiff has committed perjury, and that the defendant intended to be so understood by those who heard him, such words will, of themselves, warrant a verdict for the plaintiff, in case the jury find that they were uttered with the intention above stated, and were so understood. *ib*
4. The defendant, on being reminded by the plaintiff of a law suit which

he, (the defendant,) had recently lost, said, "Yes, your false swearing at that trial." Being told that he had better not accuse the plaintiff, again, of swearing false, he said: "Any man who professed to be a Christian, as you do, and went into the box and swore false as you did, at that trial, had better join the church once more," &c. The charge of swearing false, in the suit, was repeated five or six times. The defendant also said that "The folks who belonged to the church and built tall steeples thought they could swear false, or do any thing they had a mind to." *Held*, that the slander admitted that a suit was pending, and it was to be intended that what the plaintiff swore to was material; and that the words were sufficient to warrant a finding in favor of the plaintiff, without proof that the suit was in a court of competent jurisdiction, or that the plaintiff swore falsely with a corrupt intent. *ib*

5. In an action for slanderous words, imputing to the plaintiff the crime of perjury, the defendant alleged in his answer, and offered to prove on the trial, that in a certain action theretofore pending before a justice of the peace, the plaintiff was sworn as a witness, and gave testimony material to the issue, which was untrue; and that whatever the defendant said of the plaintiff, had exclusive reference to such testimony. *Held*, that the matter thus pleaded and offered to be proved, was clearly insufficient as a justification, because it did not contain an averment that the plaintiff knew the testimony given by him to be false, or that he testified corruptly. The averment in the answer might be true, and yet the plaintiff be innocent of the crime of perjury. *Gorton v. Keefer*, 475
6. *Held, also*, that the offer was equally insufficient for the purpose of mitigating damages; mitigating circumstances being those which tend to disprove malice. And that although the circumstances set out in the answer might have had a tendency to induce in the mind of the defendant a belief that the plaintiff had committed perjury, yet that fact not being alleged in the answer, the tes-

timony was properly excluded, when offered in mitigation. *ib*

7. In pleading circumstances, which are claimed to be proper in mitigation of damages, for the reason that they induced the defendant to believe that the charge made by him was true, the fact of such belief, and that it was so induced, is an essential one, and should be distinctly alleged. *ib*

8. But such an averment would be improper in an answer setting up a justification. Such an answer necessarily insists upon the truth of the charge, and it must allege facts showing that the plaintiff is guilty of the offense or disreputable conduct imputed to him. *Per J. C. SMITH, J.* *ib*

9. An answer in mitigation impliedly admits that the charge was unfounded, but denies that it was made maliciously; and when such answer undertakes to set up that the charge was made in a belief of its truth, it must allege, not only circumstances tending to produce such belief, but also the fact that such belief, so produced, existed in the mind of the defendant when he made the charge. *Per J. C. SMITH, J.* *ib*

10. Words imputing to a mechanic want of skill or knowledge in his craft, are actionable *per se*, if they are clearly shown to have been spoken with reference to the plaintiff's occupation, and the employment is one requiring peculiar knowledge and skill. *Fitzgerald v. Redfield*, 484

11. In this respect the authorities recognize no distinction between a learned profession and a mechanical trade; and manifestly there is none, in principle. *Per J. C. SMITH, J.* *ib*

12. Thus, to utter words charging one who is a mason by trade and occupation, with gross want of skill, knowledge and capacity in his craft, and to say, of and concerning him and his trade, "that he was no mechanic; that he could not make a good wall, or do a good job of plastering; that he was no workman; and that he was a botch" is actionable *per se*. *ib*

## SPECIFIC PERFORMANCE.

*See GIFT.*

## STAMPS.

A receipt, such as is usually given by express companies for goods delivered to them for transportation, is not subject to any stamp duty, but is covered by the exception in the act of congress of 1866. *Belger v. Dinmore*, 69

## STATUTES.

*See* CONSTITUTIONAL LAW, 1, 9, 10.  
HOTEL KEEPERS.  
MUNICIPAL CORPORATIONS, 1, 4, 5, 8, 11.  
NEW YORK, (CITY OF,) 1.  
PULTENEY ESTATE.  
ROCHESTER, (CITY OF.)  
VENDOR AND PURCHASER, 9, 10, 11.

## STREETS.

*See* ASSESSMENTS.  
CONSTITUTIONAL LAW.  
DEDICATION.  
MUNICIPAL CORPORATIONS.

## SUPREME COURT.

*See* JURISDICTION.

## SURPLUS MONEYS.

*See* WILLS, 9.

## T

## TAXES AND TAXATION.

1. A resident of this state is not liable to be assessed and taxed here, for his capital invested in loans in other states upon securities taken and held in those states, by his agents. *The People ex rel. Jefferson v. Gardner*, 352
2. Whether the owner of property thus situated is liable to be assessed here, for it, depends upon the question whether it can be properly and legally held to be within this state, at the

time of the assessment. As such property has no actual location or *situs* within this state, notwithstanding the owner resides here, it is not subject to taxation. *ib*

*See* MUNICIPAL CORPORATIONS.

## TOWING.

1. The owners of a steamboat employed in the business of towing boats, for hire, are not common carriers, and hence not insurers. But they are liable if guilty of gross carelessness, if not for a failure to exercise ordinary care in the management of the steamer and the boats towed. *Wooden v. Austin*, 9
2. A provision in a contract for towing, that the boats shall be towed "at the risk of the master and owner" of such boat, refers to the perils of navigation, simply, and cannot properly be construed to excuse the negligence of the proprietors of the towing vessel, or those in charge thereof. *ib*
3. Parties undertaking to tow a boat from one place to another are bound to do so, unless prevented by causes to which at least gross negligence on their part does not contribute. *ib*
4. The defendant agreed to tow the plaintiff's boat from Albany to New York. After proceeding about four miles, the defendants' hawser broke, and set the plaintiff's boat, with others, adrift, which floated down the river some fourteen miles, without any attempt to regain it. There was no explanation offered in respect to the strength of the hawser; or the immediate cause of its breaking; or in regard to the management of the steamer; or why an effort was not made to again take the plaintiff's boat in tow, although there was evidence to the effect that there was no difficulty in the steamer taking the entire tow through to New York. In an action against the defendants for damages occasioned by their negligence; *Held* that the plaintiff was improperly nonsuited. *ib*

## TOWNS.

*See* CONSTITUTIONAL LAW, 8, 9, 10.

## U

### UNDERTAKING.

*See* CLAIM AND DELIVERY.

## V

### VARIANCE.

Where there is a variance between the complaint and the proof, in regard to the time of delivery and acceptance of property, which has not misled the defendant, the court in the exercise of its discretion, may direct the jury to find the fact according to the evidence. *Babbett v. Young*, 466

### VENDOR AND PURCHASER.

#### 1. Of Real Estates.

1. When the time of payment has been extended with the assent of the vendor, and no certain time fixed when payment will be required, the vendor cannot afterwards forfeit the contract by requiring immediate payment, but the vendee is entitled to a reasonable time after notice, to make his payment. *Cythe v. La Fontain*, 186
2. *It seems* that the vendor may deprive himself of the right to exact a forfeiture by afterwards refusing payment upon another and untenable ground. *ib*

#### 2. Of Chattels.

3. On a sale of a quantity of wood, the purchaser, after he had drawn away two loads; and while in the act of drawing away a third, discovered that the quality of a portion of it was different from what the contract called for; *Held* that he could not rescind the contract of sale, except by restoring, or offering to restore, what he had received under it. *Woodruff v. Peterson*, 252
4. On an executory contract of sale, the vendee, if he keeps the article, may, *it seems*, recoup his damages, in case of fraud, but not for breach of contract. *ib*
5. A delivery by a vendor, to a specified carrier, of the goods purchased,

in pursuance of the verbal order and direction of the purchaser, is in law, a delivery to the latter, and *ipso facto* an acceptance by him of the property. *Glen v. Whitaker*, 451

6. The parties made a parol agreement at Rochester, for the sale and delivery by the plaintiffs to the defendant of a clover machine, of the value of \$875. At the time when the agreement was made, a machine of the value and description of the one mentioned therein was completed, and pointed out to the defendant, who directed the plaintiffs to ship said machine by the New York Central Railroad to S. at Penn Yan. The machine was so shipped, and received by S. and was retained by him with the knowledge of the defendant, and was not returned to the plaintiffs. *Held*, that these facts were conclusive, and sustained the conclusion of the referee that as between the vendors and vendee, the latter accepted the property. *ib*

7. *Held, also*, that the rights of the parties were fixed by the delivery of the machine to the carrier, pursuant to the directions of the defendant, and that the title thereby passed to him. And that a letter, subsequently written by the defendant, repudiating the agreement and countermanding the order for the machine, was ineffectual as a countermand. *ib*

8. That in the absence of fraud, or of evidence showing that the machine was not the same he selected, or that it was not in as good condition at the time of delivery, as it was at the time of selection, the purchaser had no right to return it, after it was delivered to the carrier. That the case was the same, in that respect, as if the delivery had been to himself personally. *ib*

9. Under section 97 of the act of congress, passed June 30, 1864, "to provide ways and means for the support of the government, and for other purposes," (18 U. S. Stat. at Large, p. 270.) which provides "that every person, firm or corporation who shall have made any contract prior to the passage of this act, and without other provision therein for the payment of duties imposed by

law enacted subsequent thereto, upon articles to be delivered under such contract, is hereby authorized and empowered to add to the price thereof so much money as will be equivalent to the duty so subsequently imposed on said articles, and not primarily paid by the vendee, and shall be entitled by virtue hereof, to be paid, and to sue for and recover the same accordingly," prepayment of the duty by the vendor is not a requisite to his claim to recover the same of the vendee, in an action brought for the price of the goods sold. *Babbett v. Young*, 466

10. By section 94 of that act, the manufacturer is made liable primarily for the payment of the tax; and this liability makes his claim against the vendee as complete as if he had actually paid. The effect of section 97 is to cast this liability, ultimately, upon the party purchasing of the manufacturer. *ib*

11. The law merely adds to the certainty of collection, and is but one of the means which congress had power to adopt, to accomplish the end designed. *ib*

12. The plaintiffs, on the 8d of January, 1867, wrote to the defendants, at M. offering to sell them one hundred barrels of apples, delivered in the railroad cars at Havana depot for \$3.50 per barrel, stating the kind of apples and their condition. The apples were to be shipped immediately, and for the price the plaintiffs were to draw on the defendants at sight. The defendants replied by letter, that if the apples were of good size, fair and sound, the plaintiffs might ship them at once. On the 10th of January, the plaintiffs shipped one hundred barrels of apples on the cars, directed to the defendants at M.; the defendants not being present at the time of shipment, to receive the apples, nor seeing them until they arrived at M. They were received by the defendants, at M. on the 12th of January. On opening and assorting them, eighty-two barrels were found to be merchantable, and eighteen barrels rotten and worthless. On the 15th of January, before the assorting was completed, the defendants sent the plaintiffs a check for a part of the price. After

they had completed the assorting, they sent the plaintiffs a check for the balance of the price of the eighty-two barrels of sound apples, and refused to pay for the eighteen barrels found to be unsound. The plaintiffs returned the checks, and brought an action to recover the price of the whole consignment. *Held* 1. That the defendants not having been present to receive or accept the apples when delivered on the cars, and they not having paid for, received or accepted them until they arrived at M. it was a case, not of sale and delivery with warranty, but an executory contract to sell and deliver one hundred barrels of good and merchantable apples. 2. That the defendants having received the apples, and not having rescinded the contract, on examination and discovery of the defects, by a return, or an offer to return the property, or giving notice of their refusal to receive the same, and that the apples were subject to the plaintiffs' order, had waived the alleged defects; and their right to recoup the damages arising therefrom, did not survive such acceptance. 3. That the defendants did more than this; they affirmed the contract and their acceptance of the apples thereunder, by a tender of payment for the apples which they conceded to be good. 4. That there having been no delivery with a warranty, it was not a case that should have been submitted to the jury on the questions connected with the recoupment; and the court was right in ordering a verdict for the plaintiffs. *Weaver v. Wiener*, 688

*See* AGREEMENT.  
EJECTMENT.

## VILLAGES.

*See* MUNICIPAL CORPORATIONS.

## W

### WAREHOUSEMEN.

1. Warehousemen are bound, like all bailees who receive a benefit from the bailment of goods, to exercise

ordinary care and diligence, and are responsible only for ordinary neglect. *Tinsworth v. Wunnagar*, 148

2. The basis of the claim against a warehouseman for neglect in the care of goods, is that he is in possession of the goods as a depository for hire. It is in respect to this right to receive compensation for storage, that he is liable for injury to the goods, or their loss in consequence of, or arising from, his neglect. *ib*

3. A carrier of goods by canal, when within about a mile and a half of the place of delivery, with the goods, presented the bill of lading to the warehouseman to whose care the goods were consigned, and informed him that his boat could proceed no further, on account of the ice in the canal, and requested the warehouseman to pay his charges for freight. The latter thereupon paid such charges, and gave a receipt on the shipping bill, for the goods, and the boat was left in the charge of a third person. Subsequently the owner paid the warehouseman his charges on the property, and his advances to the carrier for freight. The goods, while remaining on the boat, were damaged by water. *Held*, that when the warehouseman's charges and advances for freight were paid by the owner, the latter was entitled to take immediate possession and control of the goods, and they were not, after that time, subject to any lien or claim of the warehouseman for storage, or other services, nor was he liable for any loss or damage happening to such goods. *ib*

4. *Held, also*, that there was no consideration for any contract by the warehouseman to take care of the goods, and none could be implied. That there was no duty, on his part, to take care of the property, because there was no assumption to pay for such care, and no lien in his favor could exist upon property remaining in the possession of the carrier. *ib*

### WARRANT.

*See* CRIMINAL LAW.

## WASTE.

1. Although the common law doctrine of *waste* is not, in its strictness, applicable to the condition of things in this country, such a cutting of trees or timber by a tenant as will work a permanent injury to the freehold or inheritance, in the absence of any specific leave or license to cut such trees or timber is *waste*, for which an action will lie, in equity, for the prevention of such injury, by injunction, before it is committed, or at law, for the recovery of damages, by the remainder-man, after the injury is done. *McCoy v. Wall*, 225
2. Whether the cutting of trees and timber in any case is such an injury to the inheritance, or not, is necessarily a question of fact for the jury, or the court, when the action is tried by the court, without a jury. 23

## WILL.

## 1. Rules of Construction.

1. When a will recognizes the ancestor as living, and makes a devise to his heirs, *eo nomine*, this shows that the term is not used in its strict sense, but as meaning the heirs apparent of the ancestor named. *Vannoradall v. Van Deventer*, 187

## 2. Construction of, in particular cases.

2. A testator, after directing the payment of his debts, by the second and third clauses of his will, gave to his wife all his personal property, and all his real estate during her lifetime. By the fourth, fifth and sixth clauses he gave and bequeathed to the "legal heirs" of his brother A., deceased, and to the "legal heirs" of his sister M., deceased, and to the "heirs" of his brother-in-law, W. V., all his real estate at the death of his (the testator's) wife "to be divided equally between each of the heirs above named," after the decease of his said wife. The testator died without issue, and his wife afterwards died. W. V. was still living. The testator's wife was a sister of W. V., the father of the defendants, and the latter, upon the death of their father would be his heirs at law. In an action

for the construction of such will; *Held* that the real estate mentioned in the will belonged to, and was owned in common by the parties to the suit, and that each of the twelve plaintiffs and the two defendants was entitled to one fourteenth thereof. *Held, also*, that the intent of the testator was to give to his wife his real estate during her life, and after her decease to give the same in equal portions to the three classes of persons who should be heirs of his brother A., of his sister, M., and of his brother-in-law W. V.; the words "heirs," so far as related to the heirs of W. V. being used as synonymous with *children*; and in respect to the heirs of A. and M. there was no contingency in respect to the persons to take, and the estate would vest immediately upon the death of the testator. *Vannoradall v. Van Deventer*, 187

3. A testator, by his will, gave and bequeathed to his executors, \$1200, to be taken from any funds belonging to his estate, directing them to invest the same in the purchase of a dwelling house and lot, such as should be selected by his wife, and gave her the use of such house and lot for life. And he directed his executors, after her death, to sell the same, and pay over the proceeds of the sale, in equal shares, to the plaintiffs and a missionary society. This, together with other provisions of the will for his wife, the testator declared to be upon the condition that she should accept the same in lieu of dower, thirds or other share of his estate. The wife survived the testator about a month, and died before the probate of the will, and without having elected to accept the provisions thereof for her benefit, in lieu of dower, &c.; and the executors did not purchase any house and lot under the trust. *Held*, that the plaintiffs became entitled, absolutely and unconditionally, to one half of the fund of \$1200 given to the executors in trust, upon the death of the widow of the testator, payable at the expiration of one year next after the issuing of the letters testamentary. *The American Bible Society v. Hebard*, 552

4. *Held, also*, that the plaintiffs took, as legatees, merely, the bequest, dis-



charged from the incumbrance of the trust. That their right to one half the contemplated fund was a vested right from the beginning, or, in any event, at the death of the widow. That an action in the nature of a legal action, to recover the legacy, could have been maintained at the end of a year from the granting of letters; and that, as more than six years had elapsed since the expiration of the year, before the action was commenced, the claim was barred by the statute of limitations. b

5. A testator, by the third clause of his will, devised and directed as follows: "Whatever advances I have made to any of my children, or to the husbands of any of my children, for which any receipts or other evidences of indebtedness may be found among my papers after my decease, I hereby give and devise to my said children, to each one the advance made to each; my intention being by this that such receipt or other evidence of indebtedness, shall not be collected or enforced against them, or either of them, who may have signed the same, but that the same be given up to that one of my children, who may have in person, or whose husband may have signed the same, the receipt or other evidence as aforesaid of each to each." *Held*, that the entire tenor and scope of the clause, showed clearly that the testator had in view not gifts and advancements previously made as such, but advances only, in the nature of loans, and for which he held vouchers whereby the claims could be enforced. And that it embraced, under the term "evidence of indebtedness," a mortgage given by one of the testator's children with her husband, for money borrowed of the testator. *Chase v. Boing*, 597

6. *Held*, also, that the mortgage purporting on its face to be given in "consideration of the sum of \$2166, to them [the mortgagors] duly paid," and reciting, in the condition, that "this grant is intended as a security for the payment of \$2166, payable in one year from the date hereof, with interest, which payment, if duly made, will render this conveyance void," it was of itself evi-

dence, upon the trial, not only of the indebtedness, but also of the default in payment; and was therefore the identical thing described in the third clause of the will—an evidence of indebtedness for "advances;" and could not be enforced. b

#### 8. Of Married Women.

7. Married women being permitted by the act of 1849, (c. 375,) to make wills devising real and personal estate, the same statute which protects the after-born children of their husbands from wills made by such husbands, also protects the children of married women from wills made by their mothers previous to the birth of such children. *Plummer v. Murray*, 201

8. Hence children born after the making of a will, and not provided for and not mentioned therein, are to succeed as in case of the intestacy of the parent making such will, whether father or mother. b

9. Accordingly, where a married woman, in 1861, being then childless, made a will devising real and personal estate to her husband, and afterwards had a child born, who survived her; *it was held* that such child, after her mother's death, was entitled to surplus moneys arising from the sale under a foreclosure, of the real estate devised, subject to the husband's life estate as tenant by the curtesy. b

10. The provision of the Revised Statutes declaring that "a will executed by an unmarried woman shall be deemed revoked by her subsequent marriage," is not repealed by implication by the acts of 1848, 1849 and 1860, for the more effectual protection of the property of married women, but is still in force. *Loomis v. Loomis*, 257

#### 4. Proof of Execution.

11. No unvarying rule, as to the amount of proof necessary to establish the execution of a will can be laid down which is to control every case, as the circumstances of each case must differ from any other. Hence it becomes the duty of the

court to ascertain, from all the facts and circumstances, whether the instrument offered is established with reasonable certainty, and if it is, to receive the same. *Eider v. Legg*, 280

12. Where all the three subscribing witnesses to a will executed since the Revised Statutes took effect are dead, proof of the signatures of two of them, with a perfect attestation clause, and other circumstances

tending to favor the probability that the will is genuine, are sufficient, after a great lapse of time, to justify the reception of the will as evidence, without proof of the signatures of one of the subscribing witnesses and the testatrix. <sup>3</sup>

#### WORK AND LABOR.

*See* AGREEMENT.

*L. J. A. A.*

END OF VOLUME FIFTY-ONE.

*Ex. R. U.*

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